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ABSTRACT

This booklet contains five chapters relating to issues in school safety and security, and fair dismissals: (1) "Ohio Legislation and Federal and State Decisions" (Richard J. Dickinson). Items of deliberation include financial matters, school safety issues, administrator and teacher contract matters, Title IX liability, school prayer, drug testing of students, public records, racist books in curricula, and students with disabilities; (2) "Keeping Our Students Safe: School Violence, Sexual Predators, and Child Abuse" (John P. Concannon). Topics are categorized under school violence, and reporting of suspected child abuse or neglect; (3) "School Safety and Security" (Robert L. Morgan). Philosophy, risk assessment, basic security tactics, practical preventive measures, and other issues are discussed. Text is in large print and in an overhead presentation format; (4) "Teacher Evaluation, Fair Dismissal and Termination Requirements" (George S. Crisci). Statutory requirements for teacher evaluation and dismissal are described in detail for school officials' edification; and (5) "Fair Dismissal Proceedings and Mock Hearing" (Gregory B. Scott and Julie C. Martin). Legal strategies and settlement strategies are outlined, and a fair dismissal mock hearing is recorded. (RT)

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One-Day Conference on

School Safety & Security and Fair Dismissals Issues

University of Dayton
School of Law
Joseph E. Keller Hall
Dayton, Ohio
June 24, 1999

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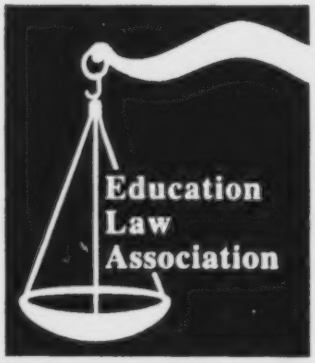

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1999 ELA Summer Conference
June 24, 1999
Dayton, Ohio

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OHIO LEGISLATION

AND

FEDERAL AND STATE DECISIONS

UPDATE

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I. Financial Matters

A. The 2000-2001 Education Budget: House Bill 282

Still pending at the time this outline was prepared. Details, if available, will be presented at the seminar.

B. Electric Utility Deregulation: House Bill 5/Senate Bill 3

Originally there were two pieces of legislation, Senate Bill 3 and House Bill 5. Senate Bill 3 has now become the vehicle for consideration of electric deregulation in Ohio. Ohio's consideration of this issue is part of a national movement. Approximately 20 states have already enacted legislation. Because of this, Ohio electric companies are currently at an economic disadvantage because they are taxed at higher rates than companies in other states.

The assessment rate on electric utility generating property is presently 100% of valuation. The rate for nongenerating equipment is 88%. Other business property in Ohio is assessed at 25% of valuation. Senate Bill 3 would reduce the valuation of the utility property to 25%. The impact on schools would be significant. Thirty-four school districts have power plants and would suffer the greatest loss of revenue. But revenue losses will effect all 88 counties because they share a portion of the tax base of the generating plants since taxes are levied on transmission and distribution equipment as well.

Senate Bill 3 contains a replacement plan which spans a 15 year period. For the first 5 years (2001 - 2006) there would be 100% revenue replacement to school districts and local governments. In years 6 - 15 schools would continue to receive 100% replacement of electricity tax loss unless there is growth in basic state aid that exceeds electric utility revenue loss times inflation. After 15 years there will be a study committee established to assess the impact of the revenue replacement system and to make recommendations or modifications.

C. Inventory Tax Repeal:

A proposal has been introduced in the general state budget bill to repeal the inventory tax currently paid by Ohio businesses. The reduction would be 1% per year for 25 years to eliminate the tax in its entirety. A study conducted by the Education Tax Policy Institute indicates that school districts will lose up to 62% of total property tax revenue if this proposal is implemented.

D. Dusquesne Electric Case

The Ohio Board of Tax Appeals ruled on November 6, 1998 that Dusquesne, one of several owners of the Perry Nuclear Power Plant, had overpaid state taxes on certain classes of personal property. Dusquesne's refund could be $27 million. Dusquesne owns only 14% of the Perry facility. Refunds to all owners could total $201 million. Application of the decision to other utility companies could produce a tax loss of more than $650 million. The decision has been appealed to the Ohio Supreme Court.

E. DeRolph Case

The latest ruling in this school funding litigation which has continued since 1991 was issued on February 26, 1999 by Perry County Common Pleas Judge Linton Lewis. In essence, Judge Lewis was considering whether legislative enactment's by the Ohio General Assembly satisfied the ruling of the Ohio Supreme Court that the current system of funding elementary and secondary education in Ohio fails to comply with standards set by the Constitution of the State. In his most recent ruling, Judge Lewis found that the State of Ohio " . . . has failed to comply with the rulings of this court and failed to follow the directive of the Ohio Supreme Court. The State has not implemented a complete systematic overhaul of the Ohio School Funding System."

Judge Lewis indicated that while many minor changes had been made with little exception those were changes of form and not substance. He stated that the General Assembly has failed to address the "horrific facilities problem" finding that although the State had increased funding to address facilities problems that the facilities problem is so immense that the State's effort has been "woefully inadequate". Judge Lewis also found that borrowing " remains as much a part of Ohio's system of school funding now as it was in 1993." The court also found that the State had not materially altered the foundation program to address the problems discussed by the Supreme Court.

The State of Ohio and State Board of Education appealed the decision on March 26, 1999. The State also sought a stay of implementation of the judge's order. Judge Lewis granted the stay with regard to the portion of his order finding the school funding system to be unconstitutional. He refused to stay a portion of his decision which required the State Board of Education to prepare a report setting forth proposals to comply with Judge Lewis' order and the Supreme Court directive. However, the stay of that portion of the order was later granted by the Ohio Supreme Court. The matter is now on appeal directly from the Common Pleas Court to the Ohio Supreme Court. As of this writing, the record had not yet been filed and so the time deadlines for filing of briefs has not been set.

F. Change of Primary Election Date: House Bill 157

1. Changes Ohio's Primary Election date from the third Tuesday in March to the first Tuesday in March.
2. Eliminates February and May primary elections.
3. New Primary Election date requires earlier board action on tax issues and eliminates one election opportunity.

G. Ohio Supreme Court Voucher Decision Simmons-Harris vs. Goff (1999) _____ Ohio St 3d _____.

The Ohio Supreme Court ruled the Cleveland Pilot Voucher Program is an unconstitutional violation of the Ohio Constitution's single subject rule for legislation. The opinion stated the voucher program does not violate the Establishment Clauses of either the U.S. or Ohio Constitutions, nor the School Funding Clause, the Thorough and Efficient Clause, nor the Uniformity Clause of the Ohio Constitution.

II. School Safety

A. School Safety Zones: Senate Bill 1

1. Defines "school safety zone" for purposes of the Criminal Code as consisting of a school, school building, school premises, school activity, or school bus.
2. Requires a sentencing court to increase the prison term by two years for a first, second, or third degree felony that is an offense of violence committed in a school safety zone.
3. Requires a school district superintendent to initiate expulsion proceedings against any pupil who has committed any act that warrants expulsion even if the pupil withdraws from school.
4. Permits districts to expel students for up to one year for firearm-related and knife-related incidents occurring off school property but at an interscholastic competition, extracurricular event, or other school activity.
5. Permits a school district board to adopt a policy authorizing its superintendent to expel for up to one year any pupil who has committed an act that inflicts serious physical harm to persons or property if it was committed at school, on other school property, or at a school activity.
6. Expands the jurisdiction of a district's general suspension and expulsion policy to include (1) misconduct by a student that occurs off of district property but is connected to activities or incidents that have occurred on district property and (2) misconduct by a student that, regardless of where it occurs, is directed at a district official or employee.
7. Permits a board of education to adopt a policy granting assistant principals and other administrators authority to suspend a student.
8. Provides for a student to lose driving privileges for misconduct that involves a firearm or knife, violates board policy, and results in the student being suspended, expelled, removed, or permanently excluded from school.

B. Teacher Discipline Authority: House Bill 89

1. Permits public school teachers to engage in certain types of conduct for specified purposes associated with maintaining discipline.
2. The types of conduct permitted by the bill include all of the following:
   a. Verbally disciplining a student
   b. Physically isolating a student within the teacher's classroom
   c. Withholding one or more privileges from a student
   d. Using physically harmless props to discipline a student
   e. Temporarily or permanently removing a student from the teacher's classroom
   f. Exercising disciplinary measures that are not listed in a - e that do not rise to the level of corporal punishment
   g. Refusing to admit or re-admit a student into the teacher's classroom if the teacher determines the student has an unreformed history of behavior that has disrupted or other wise distracted from the learning environment of the teacher's or another classroom.
3. Lets a teacher engage in any permissible conduct for specified purpose notwithstanding any rules adopted by the district board even if such conduct conflicts with such rules.
4. Confers upon public school teachers engaging in permissible conduct absolute immunity from liability.

5. The school district or educational service center employing the teacher is also given absolute immunity from liability.
6. HB 89 does not preclude criminal prosecution of a public school teacher.
7. A collective bargaining agreement may not supersede or negate any provision in the bill.

III. Contracts/Nonrenewal

A. Administrators' Contracts : Senate Bill 77

1. The bill changes the procedures that a board must follow in its evaluation of administrators.
2. The bill requires that a job description for each position be adopted locally, and the description be included in the employee's contract.
3. The evaluation, instead of being "considered" by the board, as under current law, must instead "serve as a basis in the board's decision" of whether to renew an administrator's contract.
4. Other relevant information that is outside of information obtained from an evaluation may be used as the basis in the board's decision to re-employ or not. At least 60 days prior to the board's decision the superintendent must document that the other information has been verified as to its accuracy and discussed with the administrator.
5. The bill establishes and expanded evaluation requirement. When the contract is not due to expire, only one evaluation is required
In a school year in which the administrator's contract expires, both a preliminary evaluation and a final evaluation must be completed and must identify the administrator's strengths and deficiencies. A written copy must be received by the administrator at least 60 days prior to any action on the contract.
6. The bill specifies that the failure of the board to properly notify administrator of the date the contract expires, failure to grant a meeting in executive session to discuss the board's reasons for renewal or nonrenewal of the contract, or to evaluate administrator in the manner required by law, results in an automatic re employment of the employee for a period of one year, unless the employee has been employed as an administrator in the district for three or more years, in which case reemployment would be for two years.
7. The bill also allows boards to adopt policies regarding suspension of administrator contracts. Suspensions could be based on the district's financial condition. The policy may provide for recall rights.

B. Teachers' Contracts

Geib vs. Triway Local School District Board of Education (1999), 84 Ohio St. 3d 447. Required written statement to teacher of "circumstances that led to the board's decision to nonrenew the contract" cannot be accomplished by incorporating by reference the prior written evaluations of the teacher.

IV. Title IX Liability

A. Employee harassment of students

Gebser vs.LagoVista Independent School District 524 U.S. 274, (1998). The U.S. Supreme Court held that the school district can be liable under Title IX for teacher-on-student sexual harassment but only if a school district official who has the authority to institute corrective measures has actual notice of and is deliberately indifferent to the teacher's misconduct.

B. Student harassment of student

Davis vs. Monroe County Board of Education _____ U.S. _____, (1999). The U.S. Supreme Court again held that Title IX could be a basis for a law suit on behalf of an individual student seeking damages for sexual harassment by a fellow student. However, the court set a very high standard, finding that damages could not be awarded " . . . for simple acts of teasing and name calling . . . " but rather for behavior that was " . . . so severe, pervasive, and objectively offensive that it denies its victims the equal access to education . . . " guaranteed under Title IX. The court held that school officials must have known of the harassment and, acting with "deliberate indifference," failed to take reasonable steps to stop it.

V. School Prayer

A. At school board meetings

Coles vs. Cleveland Board of Education Case No. 97-3082/3104 (C.A. 6, 1999). The Sixth Circuit Court of Appeals ruled that the practice of the Cleveland City Board Association of beginning school board meetings with a prayer was an unconstitutional violation of the Establishment Clause of the First Amendment to the United States Constitution. The court distinguished the practices of other public bodies such as state legislatures where the U.S. Supreme Court has upheld such prayer. The court said this case was closer to the school prayer cases where the courts have found that impressionable students can be influenced and that the practice therefore constitutes an impermissible establishment of religion by a state entity.

B. At school graduations

1. Lee vs. Weisman, 505 U.S. 577 (1992). This U.S. Supreme Court decision held that prayer delivered by a clergyman selected by the school principal at a high school graduation ceremony violated the Establishment Clause of the First Amendment.

2. Jones vs. Clearcreek Independent School District, 977 F. 2d 963 (C.A. 5, 1992) found that student prayer at a high school graduation ceremony could be permissible if it was student-initiated and student-led as well as nonsectarian and nonproselytizing.

3. Doe vs. Duncanville Independent School District, 70 F. 3rd 402 (C.A. 5, 1995) disallowed prayer at public high school basketball games.

4. Doe vs. Santa Fe Independent School District, Case No. 97-40150 (C.A. 5, 1999). The Fifth Circuit, relying on Jones vs. Clearcreek upheld a school policy permitting student initiated prayer at a public high school graduation, but only if the prayer was nonsectarian and nonproselytizing.

VI. Drug Testing of Students

A. Of employees

Knox County Education Association vs. Knox County Board of Education 158 F. 3rd 361 (C.A.6, 1998)
The Sixth Circuit Court of Appeals upheld the suspicionless drug testing of all applicants for teaching and administrative positions in the school district, including current employees who wanted to transfer or be promoted to those positions. The court based its ruling on a finding that teachers are in safety sensitive positions and have a reduced expectation of privacy because education is a heavily regulated business.

B. Of students

1. The only Supreme Court pronouncement on this issue is found in Vernonia School District 47 J vs. Acton, 515 U.S. 646 (1995). In that case the Supreme Court upheld drug testing of student athletes based on findings that athletes are subject to greater risks than students in the general school population, student athletes are accustomed to greater invasions of their privacy and a specific finding that the significant drug problem found to exist in the school district was believed to be led by student athletes.

2. Willis vs. Anderson Community School Corporation 158 F. 3rd 415 (C.A. 7,1998), . In this case the 7th Circuit Court of Appeals found that a policy which required drug tests of students suspended for fighting or suspended for three days or more was not reasonable and could not be implemented. Searches based on these criteria lacked reasonable suspicion required by the Fourth Amendment as stated in the Acton decision.

3. Trinadad School District No. 1 vs. Lopez (Colorado Supreme Court, 1998). The Colorado Supreme Court struck down a program which required suspicionless drug testing of all secondary students involved in extra-curricular activities.

4. United Teachers of New Orleans vs. Orleans Parish School Board Case No. 97-30885 (C.A. 5, May 29, 1998), . The Fifth Circuit Court of Appeals held that a school district policy which required drug testing of employees injured in the course of employment could not be enforced because the policy violates the Fourth Amendment.

5. Todd vs. the Rush County Schools, 133F. 3rd 984 (C.A. 7,1998) In this decision the Seventh Circuit Court of Appeals upheld the suspicionless drug testing of students involved in extra-curricular activities.

6. Miller vs. Wilkes, Case No. 98-3227 (C.A. 8,1999). The Eighth Circuit Court of Appeals upheld a policy requiring secondary school students who desired to participate in extracurricular activities to submit to random drug tests.

VII. Public Records

State, ex rel. Sensel vs. Leone (1999), 85 Ohio St. 3d 152. Ohio Supreme court refused to find violation of Ohio's Public Records law where school district superintendent disposed of unsolicited letters, some unsigned, complaining about a school district employee. The superintendent is " . . . the person who decides what records are necessary for the adequate and proper documentation of the organization's functions, policies, decisions, procedures and essential transactions."

VIII. Racist Books May Be Included in Curriculum

Monterro vs. Tempe Union High School 158 F. 3d 1022 (C.A. 9, 1998). The 9th Circuit Court of Appeals held that a book may not be banned from the curriculum even if the book is racist in content. Once the book has been placed on a mandatory reading list after being determined to have legitimate educational value, it cannot be removed based on its content without violating students' First Amendment rights.

IX. Students With Disabilities

Cedar Rapids Community School District vs. Garrett F. ____ U.S. ____ (1999). The case involved a student who required special education under the Individuals With Disabilities Education Act (IDEA). The student's parents, who had paid for a full time nurse for their ventilator-dependent child, questioned whether the school district should be responsible for the costs of the aide. On March 3, 1999 the U.S. Supreme Court held that the IDEA requires that districts pay for related services which includes health services so long as they do not need to be provided by a physician. The Court held that the help of a full-time nurse was required to permit the child to remain in the public school setting. The Court went on to find that the federal law requires that related services be provided to students with disabilities and that there is no restriction on related services based on a cost standard of "reasonableness".

Keeping Our Students Safe: School Violence, Sexual Predators, and Child Abuse

Education Law Association Conference
June 24, 1999

Presented by

John P. Concannon
General Counsel
Cincinnati Public Schools

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I. *School Violence*

A. Student Searches

1. Leading Cases:

New Jersey v. TLO:

The Supreme Court held that the Fourth Amendment, which prohibits unreasonable searches and seizures, applies to students, but that only reasonable suspicion, not probable cause, is necessary to conduct the search of a student. So, warrantless searches of students are upheld if there is reasonable suspicion that the student possesses evidence of illegal activity or activity that would interfere with school discipline and order. The reasonableness standard requires a two-fold inquiry:

- Was the action justified at its inception? This prong is satisfied "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."
- Was the search as actually conducted reasonably related in scope to the circumstances that justified interference in the first place? This prong is satisfied when the measures adopted for the search "are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Vernonia School District 47J v. Acton, 515 US 646 (1995):

The Supreme Court upheld suspicionless, mandatory, random drug testing of student athletes. The court recognized the need to combat drugs in schools to the level of a compelling government interest.

2. Body Searches:

- The standard from *TLO* is applied to determine the reasonableness of the search.
- Courts differ on whether officials need to have individualized suspicion as to the student being searched. For instance, some courts have held that searching an entire class merely because someone in the class violated a school rule is not a "reasonable search."

3. Strip Searches:

- Considered to be the highest degree of intrusion, and traditionally disfavored.

4. Lockers:

- Property of the school, not the student. There is a privacy expectation as to other students, not administration.
- An Ohio statute (RC 3313.20) specifically authorizes school principals to search student lockers and articles within them if an emergency situation exists or appears to exist such that there is an immediate threat to health,

safety, or property, and it is reasonably necessary to search the locker in order to avert this threat.

- This statute also authorizes boards of education to in turn authorize principals to search lockers and the contents therein. The policy can allow the principal to search based on (1) a reasonable suspicion that the locker or its contents contains evidence of a pupil's violation of a criminal statute or of a school rule and/or (2) a random search policy without regard to reasonable suspicion if the board of education posts notice of the policy in a conspicuous place.

5. Case Law Involving the Use of Metal Detectors:

People v. Dukes, 151 MI SC 295, 580 NYS 2d 850 (Criminal Court, 1992):

Metal detector was used with guidelines allowing police officers to use any random formula to search (every 2nd, 3rd, etc.), but not to search a particular student unless they had reasonable suspicion to believe that he or she had a weapon. Search was upheld under the administrative search rationale. Administrative searches don't require individualized suspicion, because they are designed to prevent the occurrence of a dangerous event and are aimed at a class, not individuals. This standard applied because the court reasoned that the government interest in safety of public schools is equal, if not greater than, the interests justifying airport and courthouse searches. The court also found the guidelines for conducting the search limited the intrusiveness of the search and the discretion of the police officers conducting it. Thus, the search was upheld as reasonable.

442 Pa. Super. 216, 658 A.2d 1375 [100Ed.LawRep. [1098]] (1995):

Similar procedures to those used in Dukes were used. This was also upheld as an administrative search, so individualized suspicion was not required. The students' privacy interests were considered minimal because the school made efforts to make students and parents aware of the policy. The uniform procedures safeguarded students from the discretion of those conducting the search. Under TLO standard, court found that the search was reasonable; it was justified at its inception because of the high rate of violence at the school and the search of all of the students was reasonable in scope because there was no way of knowing which students were carrying weapons.

People v. Pruitt, 278 Ill. App. 3d 194, 662 N.E. 2d 540 (1 Dist. 1996):

Individual suspicion was not required to conduct random metal detector search of students at a high school that had been the site of considerable violence. Discretion was properly limited because all students had to walk through. The intrusion was considered minimal because the purpose of the search was to protect and maintain a proper educational environment, not to secure evidence of a crime.

B. Controlling School Violence through the Regulation of Student Dress

1. Constitutional Background: Student Dress Codes

In reaction to school violence many schools prohibit clothing identifiable as gang clothing and some states have passed laws mandating school uniforms. There is no uniform agreement among educators on whether dress codes reduce school violence. Personal opinions will always differ, but when schools regulate students' dress they must have an understanding of the Constitutional implications. Some argue that choice of dress is a form of expression protected by the First Amendment. All citizens have First Amendment Rights but the government has broader discretion in limiting the rights of schoolchildren than adults, and school districts are given considerable latitude to ensure an environment that is safe and conducive to learning.

2. Background Cases:

Tinker v. Des Moines Independent Community School District, 393 US 503, 89 S.Ct. 733 (1969):

Several students were suspended for wearing black armbands in protest of the Vietnam War. The Supreme Court found that First Amendment rights apply in all situations in which students seek to freely express themselves on the school campus, whether in the cafeteria, hallways, extra-curricular activities. *There must be actual or likely classroom disruption or violence on the school campus to justify a restriction on student speech.*

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986):

Student was suspended for using sexually explicit language in a campaign speech at a school assembly. Court said school officials had right to discipline student for using lewd and vulgar speech. *This case allows for the regulation of clothing that is not conducive to the educational environment.*

Hazelwood School District v. United States 433 U.S. 299, 94 S.Ct. 2736 (1977):

Public schools generally are not open forums in the same sense as streets or parks so school officials can impose reasonable restrictions on free speech.

3. General Guidelines in Regulating Student Dress

- Administrators may only regulate expression when there is evidence that the regulations are "necessary to avoid material and substantial interference with schoolwork or discipline."
- When a student claims to be engaging in symbolic speech, courts generally apply a two-pronged test: (A) Was there an intent to convey a particular message, and (B) was there a great likelihood that the message would be understood by those who viewed it. If this standard is met, the school officials must show that they have a reasonable expectation that the disputed attire would substantially disrupt or materially interfere with school operations, including appropriate discipline or the rights of other students.
- Actual wording of dress code is important. Wording should forbid conduct that would materially disrupt or interfere with the educational process or

threaten the safety of other students. If this language is used, administrators' decisions will be given great deference. If regulation seems to express a school official's personal prejudice that is not based on a rational purpose related to the educational mission of the school, it is unlikely to be upheld.

4. Regulation of Specific Gang-Related Clothing

- General Guidelines in Regulating Gang-Related Clothing

-Schools must show an actual need for a specific restriction. It cannot be merely preventative. There must be an actual presence of gang activity.

-In order to meet the *Tinker* standard, schools can argue that gang symbols lead to material or substantial interference with the educational process and rights of the other students.

- Case Law Examples

Oleson v. Bd. of Education of School District No. 228, 676 F. Supp. 820 (N.D. Ill. 1987):

The school dress code prohibited male students from wearing earrings. School officials had learned that many of the male students were wearing earrings to show their gang affiliation and the school board had adopted a general policy that banned wearing or displaying any gang symbols. The court found that there was no first amendment problem because there was no particularized message worthy of protection. There was no gender-based discrimination because the policy was based on discouraging gang membership and girls didn't wear earrings to indicate gang membership.

Jeglin v. San Jacinto Unified School District, 827 F.Supp 1459 (C.D. Cal. 1993):

The school banned all clothing with collegiate or pro-sports insignia. The court upheld the regulation because the school could demonstrate gang activity in the school and document a connection between the clothing and the gangs. However, the ban was unconstitutional at the middle and elementary levels because the district couldn't prove there was gang activity there.

Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D.N.M. 1995):

The court held that students did not have a constitutionally protected right to wear baggy or sagging pants. Though the student claimed that a particularized message was conveyed by his sagging pants- an attempt to show a link to his black identity and black culture- he could not show that others would understand the message.

5. Uniform Policies as an Attempt to Prevent Violence

- The Controversy:

The major argument in favor of uniforms is that they will minimize potential violence by reducing potentially dangerous situations such as students unknowingly wearing gang colors, students fighting over clothing, and concealing weapons with certain accessories and attire. Advocates believe that government interests in reducing dangerous situations outweigh any incidental burden on students even if clothes are a protected form of speech. Opponents of school uniforms believe that clothing conveys a message expressing students' ideas and individuality, thus qualifying as protected speech and regulations are

unconstitutional because they are greater than necessary to further the government interest in safe schools. Uniforms are legally untested.

- Legality of Uniform Policies:

The Supreme Court hasn't ruled on whether the expression of one's identity or personality through dress generally qualifies as protected speech under the First Amendment. If the courts find that general appearance is a First Amendment right, schools will have to show that the mandatory uniform policy furthers an important or substantial government interest unrelated to the suppression of free expression and that the policy is narrowly tailored to achieve that interest. Therefore, schools wishing to implement a mandatory uniform policy should make sure that they carefully outline their rationale for the policy and that they can document that the problems the policy addresses in fact exist in their district. In order to reduce the likelihood of litigation, schools can allow students to opt out of the uniform dress code with the consent of the parents.

C. Threats and Plans to Commit Violent Acts

1. Privacy Concerns:

The privacy rights of students often become relevant in cases of school violence. For example, a student may confide in a counselor or teacher about his or her desires or plans to harm another student. In such a scenario, schools are faced with the challenge of both giving proper protection to the student's privacy rights and addressing safety concerns.

For instance, communications between a student and a school guidance counselor are privileged under Ohio law. *See* ORC 2317.02(G)(1). However, this privilege is subject to certain exceptions, one of which is when the communication "indicates clear and present danger to the client or other persons." *See* ORC 2317.02(G)(1)(a). Just as the law attempts to balance the rights of students who might commit violence and those who might be victimized by it, school officials are often faced with the challenge of encouraging open communication with students while at the same time preventing violence among them.

2. Grounds for Punishment:

When a student threatens a student or discusses his or her desire or plan to harm another student, schools are faced with the challenge of deciding whether these words are punishable as a means of prevention. Threats of violence can be included in the student code of conduct as grounds for suspension or expulsion. For example, such threats might be termed "violent disorderly conduct" which disrupts the educational process. Boards of education are given wide latitude in making rules and regulating over student conduct. A rule will be upheld as long as there is a rational basis for it, it is reasonable, and there is a reasonable relationship between the rule and the furtherance of a valid educational purpose. See *Jacobs v. Benedict*, 35 Omisc 92, 301 NE2d 723 (CP).

D. Unruly Parents and Other Visitors

Unruly behavior by parents and others who visit the school may also present concerns about school violence. The school can deal with inappropriate behavior by these individuals in several ways.

- Criminal behavior by such individuals should be dealt with immediately through the proper channels.
- Failure to leave the premises upon reasonable request constitutes criminal trespass.
- If parents or any one else engages in conduct which is disruptive in any way to the educational process, the school may choose to notify such persons that they are not to enter the school premises again without the principal's permission and that the school will consider filing criminal trespass charges if they do so. *(See attached letter.)*

E. Recent Laws Passed in Response to School Violence

1. The Gun Free School Zones Act of 1994:

   Required states to pass laws ordering school districts to expel for one year any student who brings a firearm to school. During the 1996-97 school year, 6,093 students were expelled from public schools for bringing a firearm to school. Fifty-nine percent were high school students, thirty-four percent were in middle schools, and nine percent were in elementary schools.

2. "The School Yard Statute" 21 USC Section 860(a):

   Enhances the maximum punishment for certain drug offenses committed within 1000 feet of a school.

3. Safe Schools Act of 1994:

   Established a grant program to support local school efforts to reduce violence and promote safety. Funds are being used for such activities as conflict-resolution and peer mediation; counseling for victims; training school personnel; and creating long-term violence prevention strategies. Up to five percent of federal SSA grants may be used to purchase metal detectors and pay for security personnel.

II. *Reporting of Suspected Child Abuse or Neglect*

1. General Information

- Every state has enacted some requirements.
- Federal Child Abuse Prevention and Treatment Act
  - 42 USC Sec 5101 et seq.
  - Conditions receipt of federal assistance for child abuse programs on adoption by states of child abuse and neglect laws providing for the reporting of known and suspected child abuse and neglect.

- Many states impose criminal and civil liability for not reporting (including Ohio).
- Civil liability issues
  - Not a private civil action in most states, i.e., you are not liable just for failing to report.
  - However, in Doe v. Rains Indep. School Dist. 865 F Supp 375, 85 Educ. L.R. 245 (E.D. Tex. 1994) a claim against the district was valid when teacher was aware that fellow teacher was sexually abusing a student, but failed to take the time to make a report.
  - Actions do occur against board for negligent hiring or retention, which results in injuries to children.
  - In Curran v. Walsh Jesuit High School 651 N.E. 2d 1028, 101 Educ. L.R. 421 (Ohio Ct. App. 1995) the Court recognized that failure to report is actionable, but didn't allow a claim based on failure to report abuse of another child who was abused by the same teacher who subsequently abused the victim.

B. OHIO LAW (ORC 2151.421)

- Requires that both elementary students and elementary educators receive formal training in child abuse prevention.
- All students in grades K-6 must receive instruction in safety and assault prevention (RC 3313.60(A)(5)(d)).
- All certified elementary school staff must complete at least four (4) hours of in-service training in child abuse prevention within three (3) years of commencing employment in the district (RC 3319.073).
- Obligation to report suspected child abuse or neglect exists for all school officers and employees. This also applies to physicians, other health care officials, attorneys, and others.
- The report must occur immediately, and the report must be made to the county Children's Services Board (or county Human Services Department), or a municipal or county peace officer of the county in which the abuse or neglect is occurring or has occurred or where the student resides.
- If the person reporting provides the investigating authority with his/her address, phone number, etc., the person can expect status reports from the investigating authority.
- The statute provides immunity for the reporter.
- Duty arises when the person knows or suspects that a child under 18, or a physically or mentally handicapped person under 21, has suffered, or faces the threat of suffering, any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect.
- The report must be made by telephone or in person.

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- The oral report must be followed up with a written report from the reporter, if requested by the investigating authority.
- Person required to make the report may also take color photographs of the child.
- Once the report is made, the investigating authority must start an investigation within 24 hours.
- A Board of Education may adopt a rule requiring an investigator either to obtain parental consent or to permit a school official to be present before the investigator interviews a child on school property.
- Failure to make a report of known or suspected child abuse is a fourth degree misdemeanor.
- The reports are confidential and permitting or encouraging unauthorized dissemination of the contents is also a fourth degree misdemeanor.
- Because of immunity in reporting and criminal responsibility for not reporting, when in doubt, it is best to report.
- An attorney is not required to make a report pursuant to the statute as to any communications privileged by the attorney-client relationship. There are exceptions for clients under 18.

C. Related Laws

- Missing Child Law
  - Enacted in Ohio in 1985.
  - Requires Board of Criminal Identification and Investigation to prepare a periodic information bulletin concerning missing children. Forwarded to the Missing Children Clearinghouse in the Office of the Attorney General, distributed to law enforcement and schools in the state.
  - Law enforcement enters information into the National Crime Information Center computer within 12 hours of any missing child report.
  - Permits, but does not require, the fingerprinting of public school children.
  - Requires school officials to request from every school photographer a free wallet-sized photo of every student.
  - Requires school officials to immediately notify the Attorney General and local law enforcement agencies when a missing child attends school.
    - Requires that board adopt a policy for notification of parents when child is absent.
    - Requires school officials to notify local law enforcement when a child is enrolled without birth certificate and school records.

D. Duty to Report Crimes

- In addition to specific duty of reporting suspected child abuse or neglect, all people are required to report to law enforcement authorities a felony that a person knows has been, or is being committed.
- Failure to do so is a fourth degree misdemeanor (RC 2921.22).

E. Sex Offender Registration and Notification

- ORC Sec. 2950 - Convicted sex offenders must register with their local county sheriffs.
- Sheriff's office is required to notify superintendent when a sexual predator or habitual sex offender, whom the court has determined to be subject to community notification, moves into a specific geographical location.
- If the registered person is seen near the school without a legitimate purpose or otherwise creates concern, the district needs to inform local law enforcement which will evaluate the situation and provide advice.
- The district is authorized to share information with staff.
- District may inform parents and adult students that sheriff has contacted the district.
- The district may not give details about the offender to parents and adult students, but can tell them to contact the sheriff directly.

Education Center • P.O. Box 5381 • Cincinnati, OH 45201-5381 • Phone 513/475-7110

date

CERTIFIED MAIL

Name/address

Dear :

I have been informed that you have engaged in conduct at XXX School which has been disruptive to the educational process. According to the principal, XXX, on (date), 1999, you engaged in the following inappropriate and unacceptable behavior: XXX. It is of the utmost importance that we maintain the order and security of our schools.

You are hereby advised that you are not to enter onto the premises of XXX School without the express prior permission of the principal, XXX. This notice includes the building, the parking lot and all other Cincinnati Board of Education property at XXX School. Should you enter onto the premises without the principal's permission, the Cincinnati Police Department will be notified and we will consider the filing of criminal trespass charges. If you have any questions regarding the instructions in this letter, or your conduct of (date), 1999, please contact (principal) at (phone). If you have any questions regarding the legal issues, call me at 475-7110.

Sincerely,

John P. Concannon
General Counsel

JPC/tem

2651 Burnet Avenue • Cincinnati, Ohio 45219-2551

School Safety & Security

Education Law Association Conference
June 24, 1999

Presented by

Robert L. Morgan
Security Chief
Cincinnati Public Schools
2315 Iowa Avenue
Cincinnati, Ohio 45206
(513) 369-4652

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PHILOSOPHY

LEVEL OF AGGRESSIVENESS

TOLERANCE LEVEL

- Disciplinary Approach

POLICE INVOLVEMENT

- Criminal Decisions
- SRO/Local Police

POLITICAL ATMOSPHERE

PARENTS - STAFF - COMMUNITY

MEDIA

00022

RISK ASSESSMENT

POLICIES & PROCEDURES

CRIMES

STAFF ASSAULTS

SUSPENSIONS/EXPULSIONS

INTRUDERS

EMPLOYEE MISCONDUCT

WEAPONS - GUNS - CONTRABAND

GANGS

CONFERENCES

MEETINGS

DOMESTIC VIOLENCE

CUSTODY ISSUES

SAFETY HAZARDS

BASIC SECURITY TACTICS

00024

STRONG CODE OF CONDUCT

RELATIONSHIP WITH THE POLICE

QUICK DISCOVERY OF MISCONDUCT OR UNRULY BEHAVIOR

CONTROL OF INTRUDERS AND UNWELCOMED VISITORS

CONTRABAND AND WEAPONS IN THE BUILDING

CRISIS PLANNING

THERAPEUTIC OR REMEDIAL FOLLOWUP

MEDIA

00025

KEY ISSUES

- GUNS – WEAPONS
- GANGS
- THREATS ON STAFF MEMBERS
- INVESTIGATIONS

WEAPONS & SEARCH COMPARISON

YEAR	SEARCHES	# OF STUDENTS	ARRESTS	GUNS	INCIDENT RATE
1992/93	No Metal Detectors	N/A	N/A	7 Guns	N/A
1993/94	No Metal Detectors	N/A	N/A	15 Guns (7 SR 4 Jr/M 4 Elem)	N/A
1994/95	19 Searches	Training: M/D Equipment	N/A	10 Guns (4 SR 5 Jr/M 1 Elem)	N/A
1995/96	138 Searches	12,000 Students	52 Arrests (1 Gun, 33 Knives, 14 Drugs, 4 Other)	2 Guns (1 Jr/M 1 Elem)	1 @ 3.1 Searches
1996/97	268 Searches	20,599 Students	101 Arrests (1 Gun, 79 Knives, 19 Drugs, 2 Other)	3 Guns (2 SR 1 Elem)	1 @ 4.0 Searches
1997/98	357 Searches	27,758 Students	105 Arrests (80 knives, 25 Drugs)	4 Guns (4 SR)	1 @ 5.3 Searches
1998/99	409 Searches	28,952 Students	68 Arrests (50 knives, 18 Drugs)	0 Guns	1 @ 8.0 Searches

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GANGS

I. DO NOT NEED TO BE AN EXPERT

- TEACHING PRIMARY ROLE
- NOT GOING TO CHANGE VALUE
- RECOGNIZE POTENTIAL ACTIVITY ON BEHAVIOR

II. ACTIONS

- CRITICAL RESPONSE (EMERGENCY) - 911
- NON-CRITICAL RESPONSE
  - RECORD
  - NOTIFY PRINCIPAL
  - FOLLOW-UP
- GRAFFITI
  - PHOTO
  - NOTIFY POLICE
  - REMOVE ASAP

III. KEY ISSUES

- DID DISRUPT SCHOOL ENVIRONMENT
- CODE OF CONDUCT
- CRIMINAL CHARGES
- PARENTS - ANONYMITY - PREVENTION
- POLICE GANG UNIT

THREATS ON STAFF MEMBERS

1. NEVER IGNORED

2. SYSTEMS FOR ACTION
   - CODE OF CONDUCT - ADMINISTRATIVE
   - CRIMINAL CHARGES - COURT

3. KEY ISSUES
   - TEACHER/STAFF MEMBER IS VICTIM
   - MUST FILE CHARGES AND TESTIFY
   - ADMINISTRATIVE OR CRIMINAL

4. ASSISTANCE
   - ADVICE ON CRIMINALITY
   - FILING OF CHARGES
   - INTERACTION W/ POLICE OR PROSECUTOR

5. RESPONSIBILITIES IN MATTERS SUCH AS "THREATS ON STAFF"

   SCHOOL PRINCIPAL
   - EVALUATE THE SITUATION AND IMPOSE THE CODE OF CONDUCT

   TEACHER
   - PROVIDE ALL DATA AND FILE CHARGES IF NECESSARY. TESTIFY IN COURT AND DISCIPLINARY HEARINGS

   CENTRAL ADMINISTRATION
   - PROVIDE ADVICE AND SUPPORT FOR BOTH INTERNAL AND CRIMINAL OPTIONS
   - ASSIST WITH FILING OF CRIMINAL CHARGES IF APPROPRIATE
   - REVIEW THE DISCIPLINARY PENALTIES TO DETERMINE IF APPROPRIATE
   - DETERMINE IF NEEDED AND PROVIDE THERAPEUTIC APPROACHES AS APPROPRIATE

INVESTIGATION PROCESS

EVALUATION

CRIMINAL
ADMINISTRATIVE

INVESTIGATIVE PLAN

INITIAL COMPLAINT OR ISSUE
EVIDENCE GATHERING
WITNESS INTERVIEWS
TARGET INTERVIEW

- Tape
- Last
- Representation

WRITTEN REPORT

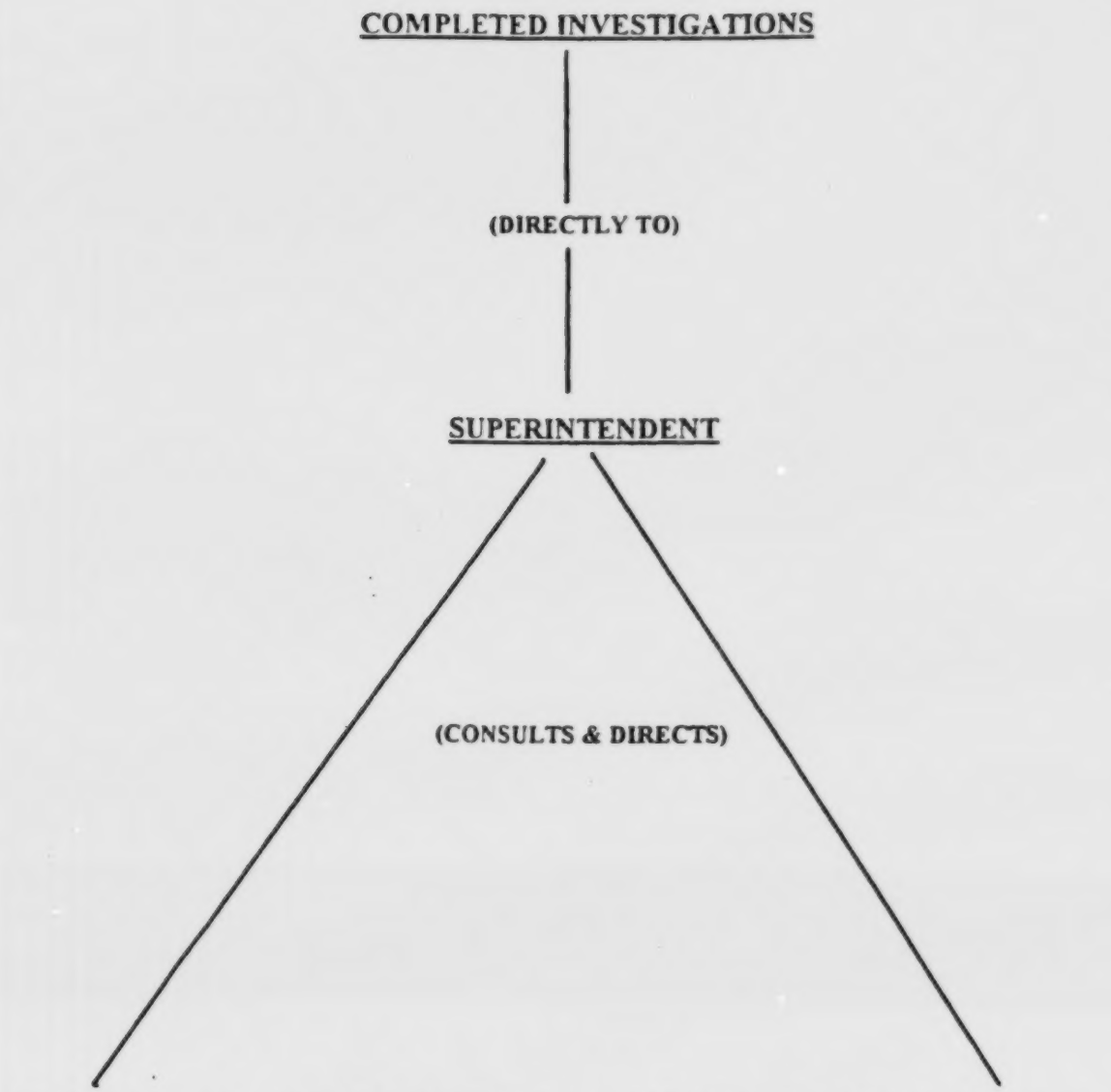
SUPPORT OR REFUTE ALLEGATIONS
CONCLUSIONS
RECOMMENDATIONS
DISCIPLINARY ACTION
SYSTEM IMPROVEMENT

DIRECTLY TO SUPERINTENDENT

BOARD LEGAL COUNSEL
VICE PRESIDENT

OTHER CONSIDERATIONS

CONFIDENTIALITY ALWAYS
ADVICE: LEGAL COUNSEL & PERSONNEL


COMPLETED INVESTIGATIONS
(DIRECTLY TO)
SUPERINTENDENT
(CONSULTS & DIRECTS)
SECURITY CHIEF
- Interpret
- Investigate
- Recommendations
HUMAN RESOURCES
- Disciplinary Action
- Personnel Process
LEGAL COUNSEL
- Legal Issues
- Research
- Appeals
VICE PRESIDENT
- System Improvements

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PREVENTIVE PROGRAMS

SECURITY RESPONSE

- Security Assistants - 108
- Response Team - Mobile - 11
- Internal Investigators

POLICE

- DARE
- SRO Program -8 Officers -1 Supervisor
- Liaison With Law Enforcement

SEARCH & SEIZURE

- Manual
- Metal Detectors
- Reasonable Suspicion - Random
- Weapons - Guns - Contraband

MECHANICAL SYSTEMS

- Night Time Alarm
- Entry Systems -45 Schools -6 Planned
- Complete Camera Systems
  -Bloom Pilot -Aiken -S.C.P.A.
- Surveillance Equipment
  -Cameras -Recorders -Monitors

COMMUNICATIONS

- Radios -600 Plus
- Transmitters -Citywide -Localized

INTERNAL PROCEDURES

- Code of Conduct - "Zero Tolerance"
- Policy and Procedures
- Union Contracts

GANG RESPONSE

- Inform Staff
- Police Involvement
- System for Information and Response

SAFETY ISSUES

- Safety Director
- Emergency Procedures -Police -Fire
- Environmental and Safety Hazards
- Emergency "Flip Chart"
- SAFE Line

TRAINING

- Mayerson Academy
- R-Team
- Handouts From Security
- "Area Of Weakness"
- Staff Training

SECURITY OFFICE ORGANIZATION

All Security Functions in One Office

- Clear Authority and Responsibility
- Develop level of expertise
- Centralized location for all security functions, procedures and decisions, eliminating fragmentation of duties
- Direct access to top administration
- Budget Issues

Functional Areas Of Responsibility

- Alarm and Surveillance
  - -Day & Night Building Protection
  - -Installation, Maintenance, Repair and Monitoring
  - -Building Access Control: Cameras Key Pads, intercom Etc.
  - -Overt & Covert Surveillance

- **Radio Communications**
  - -Systemwide & Localized
  - -Purchase, Maintenance, Repair and Inventory

- **Fixed Security**
  - -Personnel Assigned to Specific Location
  - -Uniform

- **Mobile Security**
  - -Response to Issues
  - -Search Arm
  - -Investigations and Reports
  - -Training, Advice & Support

- **Police Liaison**
  - -SRO, Local Police, DARE
  - -Interact All Law Enforcement
  - -Off Duty details
  - -Prosecution, Reports & Criminal Investigation

- Investigators
  - -Internal Affairs (Employee Related)
  - -School Related Investigations
  - -Investigator Selection is Critical

- Support
  - -Clerical
  - -Computer Records

OTHER ISSUES

<u>Clear Lines Of Authority</u>

- Direct Access by Superintendent
- In Investigations: Complete Cooperation
- Importance stressed Organizationally
- Decision Making Authority should be Clear

Reporting Process

- Formal reporting process to keep top Administration informed
- Document security issues
- Critical Investigations: Always CONFIDENTIAL - Superintendent directed ONLY
- Public Affairs issues
- Use reporting process to attack security, facilities, safety and maintenance issues

Legal Advice

- District legal counsel available for use
- Should interact on mutual issues
- Disciplinary Actions

Media

- Will be involved in school issues
- Can help or be our worst enemy
- Factual and Truthful - Public Affairs

Teacher Evaluation, Fair Dismissal and Termination Requirements

Education Law Association Conference
June 24, 1999

Presented by

George S. Crisci
Ulmer & Berne LLP

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TEACHER EVALUATION, FAIR DISMISSAL AND TERMINATION REQUIREMENTS UNDER SECTIONS 3319.11, 3319.111 AND 3319.16

By: George S. Crisci, Esq.

I. INTRODUCTION

The General Assembly's enactment of 1988 H.B. 330 raised concerns among school officials and their representatives that this statute would create numerous and severe procedural pitfalls, with the result that unqualified teachers would avoid dismissal for non-substantive, hypertechnical reasons. In the decade since H.B. 330 went into effect, there have been several unfortunate instances where these concerns have been realized, and the quality of education for students has suffered for it. Recently, however, a positive trend has developed. School officials have learned from the experiences of others by making necessary adjustments to bring their evaluation and nonrenewal procedures into compliance with statutory and judicial mandates. To be sure, this compliance process has compelled school officials to expend substantial, and oftentimes limited, resources. But this level of expenditure is far less than what schools would have to waste in unsuccessfully defending against a challenge to a nonrenewal decision, paying the teacher's lost salary and fringe benefits, and worse yet, reinstating an unqualified teacher. It is hoped that these materials will assist in this learning process and enable schools to remove unqualified teachers with a minimum of resources.

II. H.B. 330 STATUTORY REQUIREMENTS

House Bill 330 dramatically rewrote Section 3319.11 of the Ohio Revised Code – the traditional teacher nonrenewal statute, and it enacted a new Section 3319.111. Section 3319.111 imposes specific and detailed evaluation requirements. Among its numerous changes, the rewritten Section 3319.11 imposes onerous procedural requirements upon school boards and officials to provide reasons for nonrenewal decisions, to conduct trial-type hearings, and to issue a final decision. School officials who make mistakes face substantial back pay liability, or worse yet, a reinstatement obligation.

A. Evaluations

A teacher can be nonrenewed only if school officials first have evaluated the teacher during the school year that nonrenewal will be considered in the manner prescribed by Section 3319.111. The requirements are:

1. The evaluation must be conducted by a person holding the license of a superintendent, assistant superintendent, principal, vocational director, or supervisor, or a peer review advisor. O.R.C. § 3319.111(A)(1)-(3)

2. At least two evaluations must be conducted:

   a. The first evaluation must occur before January 15th, with the teacher receiving a written report of the results by January 25th.

   b. The second evaluation must occur between February 10th and April 1st, with the teacher receiving a written report of the results by April 10th.

   O.R.C. §3319.111(A). The phrase "receiving a written report" means that a copy must be provided to the teacher; merely showing the teacher a copy of the evaluation is insufficient. *Haupricht v. Rossford Exempted Village School District Board of Education*, Case No. 93DW066, 1994 Ohio App. LEXIS 2462 (6th Dist. 6/10/94).

3. Each evaluation must be based upon at least two observations of not less than thirty minutes each, thus requiring a total of four observations for two written evaluations. O.R.C. § 3319.111(A), (B)(2).

4. The written evaluation reports shall contain the following information:

   a. criteria of expected job performance in the teacher's assigned areas of responsibility, and

   b. specific recommendations regarding any improvements needed in the teacher's performance and the means by which the teacher may obtain assistance in making such improvements.

   O.R.C. § 3319.111(B)(1), (3).

B. "Reason" for Nonrenewal

A teacher who receives a timely notice of the school board's intent to nonrenew the teacher's contract, *i.e.*, on or before April 30th, has the right, within ten days after receiving the notice, to file with the school board's treasurer a "demand for a written statement describing the circumstances that led to the board's intention not to

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reemploy the teacher." This statement of reasons must be provided within ten days after receiving the teacher's demand. O.R.C. § 3319.11(G)(1)-(2).

C. Hearing Before the School Board

Within five days after receiving the written statement, the teacher then has the right to demand a hearing before the school board. O.R.C. § 3319.11(G)(3). The hearing must contain the following features:

1. It must be completed within forty days after the teacher's demand for the hearing is received by the treasurer. O.R.C. § 3319.11(G)(4).

2. A majority of the school board members must be present. O.R.C. § 3319.11 (G)(5).

3. The hearing must be held in an executive session unless the teacher and the school board agree to a public hearing. O.R.C. § 3319.11(G)(5).

4. The superintendent, assistant superintendent, the teacher, and any person designated by either party to take a record of the hearing may be present. O.R.C. § 3319.11(G)(5).

5. The parties may be represented by legal counsel. O.R.C. § 3319.11(G)(5).

6. A record of the hearing may be taken by either party at the expense of the party taking the record. O.R.C. § 3319.11(G)(5).

D. "Final" Decision of the School Board

Within ten days after the hearing has concluded, the school board must issue to the teacher a written notice of whether the nonrenewal decision stands or whether it will be vacated. In the latter situation, any record of the intention to nonrenew, notice of that intention, and the hearing before the school board must be expunged. O.R.C. § 3319.11(G)(6).

E. Required When Nonrenewal Not Performance-Based

Even though H.B. 330 is geared toward nonrenewals that are performance-based, courts generally have held that the evaluation, notice, and explanation requirements must be followed even if the nonrenewal decision is based upon reasons that are unrelated to performance. Thus, nonrenewals have been overturned that were based upon:

- "the uncertainty of the financial condition" of the school district for the next school year and "the need to keep staffing decisions open for future determination," *Haupricht v. Rossford Exempted Village School District*

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Board of Education, Case No. 93DW066, 1994 Ohio App. LEXIS 2462 (6th Dist. 6/10/94); *Smithers v. Rossford Exempted Village School District Board of Education*, Case No. 93 WD070, 1994 Ohio App. LEXIS 2458 (6th Dist. 6/10/94);

- the teacher's failure to obtain a teaching certificate in a particular subject, *Sheck v. Board of Education of Mid-East Ohio Vocational School District*, Case No. CT 93-7, 1993 Ohio App. LEXIS 5146 (5th Dist. 10/4/93);

One court, however, declined to overturn the nonrenewal of 23 teachers for financial reasons. The court held that "the Board was required to give recommendations for improvement and the means to obtain assistance solely because the statute says so, [but] even though the error occurred, the [teachers] still must show that they were prejudiced by the error." The court concluded that no prejudice had been shown because the "contracts were not renewed for economic reasons and would not have been renewed regardless of the [teachers'] improvements." *Fazio v. Springfield Local School District Board of Education*, Case No. C.A. 15549, 1992 Ohio App. LEXIS 6175 (9th Dist. 12/9/92).

III. SUPERSEDING STATE STATUTES

Section 4117.10(A) of the Ohio Revised Code permits the parties to a collective bargaining agreement to include terms and conditions of employment that supersede state law regarding those matters. More than a decade ago, the Ohio Supreme Court held that this authority to supersede state law included the teacher tenure statute, albeit a predecessor to the current Section 3319.11. *See State ex rel. Rollins v. Cleveland Heights-University Heights City School District Board of Education*, 40 Ohio St. 123, 532 N.E.2d 1289 (1988). Understandably, school districts have attempted to avoid the burdens of complying with H.B. 330 by arguing that their own evaluation procedures that are included in their collective bargaining agreements supersede H.B. 330. In recent cases involving the current Section 3319.11, however, the Ohio Supreme Court and the appellate courts have imposed strict requirements before language in a collective bargaining agreement will be deemed to have superseded the requirements of H.B. 330.

A. Specificity Requirement

The mere fact that the collective bargaining agreement contains evaluation or other procedural requirements that differ from H.B. 330 does not mean that the collective bargaining agreement supersedes the statute. Rather, the Ohio Supreme Court has held that:

> Unless a collective bargaining agreement specifically provides to the contrary, R.C. 3319.111 governs the evaluation of a teacher employed under a limited contract.

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Naylor v. Cardinal Local School District Board of Education, 69 Ohio St. 3d 162, 630 N.E.2d 725 (1994)(Syllabus ¶2). There, the Supreme Court rejected the school board's argument that it was required to follow only the evaluation and nonrenewal procedures contained in the collective bargaining agreement. The Supreme Court noted that, "The collective bargaining agreement was entered into prior to the effective date of R.C. 3319.111, and therefore does not specifically exclude or negate the rights contained in this statute." 69 Ohio St. 3d at 165, 630 N.E.2d at 728. As a result, the school board was required to comply with **both** the statutory and contractual evaluation requirements. More recently, the Ohio Supreme Court reiterated this specificity requirement where the collective bargaining agreement "contained no such specific provision excluding or negating the statutory rights contained in R.C. 3319.111," even though the contract was ratified after H.B. 330 went into effect. *Snyder v. Mendon-Union Local School District Board of Education*, 75 Ohio St. 3d 69, 72, 661 N.E.2d 717, 720 (1996).

B. Did Not Supersede

In the following instances, courts held that the contractual evaluation and/or nonrenewal procedures did not supersede H.B. 330's requirements:

- the contractual procedures required that teachers be "observed" twice, once per semester, with each observation lasting at least thirty minutes, because the contractual provisions did not specifically negate H.B. 330. *Snyder v. Mendon-Union Local School District Board of Education*, 75 Ohio St. 3d 69, 661 N.E.2d 717 (1996);

- a general statement in the collective bargaining agreement that, "This contract supersedes and prevails over all statutes of the State of Ohio (Except as specifically set forth in Section 4117.10(A), Revised Code)" was insufficient to supersede the requirements of H.B. 330 because "[t]he collective bargaining agreement must specifically indicate that teacher evaluations procedures set forth in R.C. 3319.11 do not apply in order to bypass the statute's procedural protections." *Beilhart v. Leetonia Exempted Village School District Board of Education*, Case No. 94-C-45, 1995 Ohio App. LEXIS 4134 (7th Dist. 9/22/95)(citing *Naylor*)

- a contract provision that authorized the superintendent to recommend a teacher for an extended limited contract of one or two years with reasons directed toward improvement without the school board first rejecting the superintendent's recommendation to renew the teacher's contract without such conditions did not excuse either the superintendent or the school board from providing the teacher with written notice of the superintendent's recommendation or the school board's approval of that recommendation on or before April 30th, *Felker v/ Board of Education of Mid-East Ohio Vocational School District*, Case No. 93-21, 1993 Ohio App. LEXIS 6433 (5th Dist. 12/22/93);

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- a contract provision that required only two observations for the entire school year was inapplicable because that provision applied only to teachers "whose limited contracts were up for renewal"; by contrast, the superintendent had recommended nonrenewal of the teacher's limited contract, and the contract provided that the evaluations procedures contained in H.B. 330 must be followed if a nonrenewal is to occur. *Sheck v. Board of Education of Mid-East Ohio Vocational School District*, Case No. CT 93-7, 1993 Ohio App. LEXIS 5146 (5th Dist. 10/4/93).

C. Did Supersede

In the following instances, courts held that the contractual evaluation and/or nonrenewal procedures not supersede H.B. 330's requirements:

- A collective bargaining agreement that was ratified after the enactment of H.B. 330, contained a "contract precedence clause" stating that "the provisions of the Master Contract supersede and take precedence over any provisions of the Ohio Revised Code which may be contrary to the provisions of the Master Contract." Even though Section 3319.111 was not specifically referenced in the collective bargaining agreement's section on evaluation procedures, this language was sufficient to uphold an evaluation procedure that required three formal classroom observations, each of at least thirty minutes, for which two observations were required before the first evaluation, and one observation was required before the second evaluation. *Galat v. Hamilton City School District Board of Education*, Case No. CA98-01-017, 1998 Ohio App. LEXIS 5015 (12th Dist. 10/26/98).

- A collective bargaining agreement specifically provided that its procedural provisions were in "lieu of" the statutory procedures of Section 3319.11. This language was sufficient to uphold an evaluation procedure that required two in-class observations per semester, followed by a written summary evaluation and a conference with the teacher. *Flaherty v. Barberton City School District Board of Education*, Case No. C.A. 18320, 1997 Ohio App. LEXIS 4750 (9th Dist. 10/29/97).

- The parties had executed a memorandum of understanding that the evaluation procedures in the collective bargaining agreement superseded the evaluation procedures of Section 3319.111. *Langner v. Butler County Joint Vocational School District Board of Education*, Case No. CA95-05-095, 1996 Ohio App. LEXIS 4689 (12th Dist. 10/28/96).

A specific statement that the collective bargaining agreement's evaluation procedures supersede H.B. 330, by itself, does not allow schools to avoid caselaw that interprets the statutory requirements. In one case, the collective bargaining agreement stated specifically that the contractual evaluation procedures superseded and replaced the

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evaluation procedures in Section 3319.111. The court observed, however, that the contractual language was virtually identical to the statutory language. According to the court, "because the requirements of the CBA and R.C. 3319.11 are similar, we find caselaw interpreting the evaluation requirements of the statute pertinent to our analysis. *Koch v. Greenville City School District Board of Education*, Case No. C.A. 1403, 1996 Ohio App. LEXIS 5433 (2d Dist. 12/6/96).

1. Failure to Exhaust Administrative Remedies

Section 4117.10(A) states that if a collective bargaining agreement "provides for final and binding arbitration of grievances, public employers and employees organizations are subject solely to that procedure." If the contractual evaluation and nonrenewal procedures are found to have superseded H.B. 330, and if the collective bargaining agreement provides for final and binding arbitration, then the teacher must challenge any violations in those evaluation and dismissal procedures by filing a grievance. A lawsuit that bypasses the contractual grievance and arbitration procedures can be dismissed for failure to exhaust administrative remedies and/or for lack of subject-matter jurisdiction. *Galat v. Hamilton City School District Board of Education*, Case No. CA98-01-017, 1998 Ohio App. LEXIS 5015 (12th Dist. 10/26/98).

2. Dual Lawsuit/Arbitration Challenges

With increasing frequency, school districts have faced a two-front challenge to nonrenewal decisions. The first front is a direct challenge by appealing the school board's nonrenewal decision to court under H.B. 330. In addition, teachers are filing grievances alleging that their evaluations violate the contractual procedures. Their goal is to have an arbitrator invalidate one or both of the evaluations, which in turn would preclude a nonrenewal under H.B. 330. To further that goal, teachers who appeal the nonrenewal decision to court often ask that they be reinstated pending resolution of the arbitration. To date, these efforts have been unsuccessful. *See Upp v. Washington Local School District Board of Education*, Case No. L-96-069, 1996 Ohio App. LEXIS 5159 (6th Dist. 11/22/96); *Triway Local School District Board of Education v. Geib*, Case No. 97CA0077, 1999 Ohio App. LEXIS 1738 (9th Dist. 4/14/99)(vacating arbitration decision that school board's statement of reasons for nonrenewal, which violated H.B. 330, also violated collective bargaining agreement because agreement allowed school board "to substantiate its decision with any written materials, including 'employee evaluations'").

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IV. EVALUATION REQUIREMENTS

A. Purpose

A few years ago, the Ohio Supreme Court articulated what it believed to be the purpose of the complicated evaluation procedures contained in Section 3319.111:

> R.C. 3319.111 was not designed to be an obstacle course for school boards to traverse before they can fire a teacher. The point of the requirements is positive – school boards and their administrators are forced to find out what is being taught in their classrooms and how it is being taught. The purpose of the evaluations is to assist teachers in getting better. The club that exists to force school districts to perform evaluations properly does not mean that evaluations exist only to initiate the removal of bad teachers. They are of value to all.

Snyder v. Mendon-Union Local School District Board of Education, 75 Ohio St. 3d 69, 72-73, 661 N.E.2d 717, 721 (1996). School officials who have had to persevere under these requirements naturally respond with considerable scepticism to these idealistic statements. The past decade has demonstrated that even the most objectively reasonable, comprehensive and good faith evaluations are met with a wave of second-guessing and nit-picking by unions who desire the reinstatement of unqualified teachers.

B. Need to Have a Policy

Section 3319.111(B) requires that "Any board of education evaluating a teacher pursuant to this section shall adopt evaluation procedures that shall be applied each time a teacher is evaluated pursuant to this section." Consequently, school districts that did not have an evaluation policy for teachers before H.B. 330 went into effect must have one now. Although it may seem obvious, one court rejected a teacher's argument that the school district was required to adopt a new evaluation policy after H.B. 330 went into effect, even though the old evaluation policy, found in the collective bargaining agreement and followed faithfully by the parties, adhered to the requirements of H.B. 330. *Rickel v. Cloverleaf Local School District Board of Education*, 79 Ohio App. 3d 810, 608 N.E.2d 767 (9th Dist. 1992), *cert. denied*, 65 Ohio St. 3d 1421, 598 N.E.2d 1171 (1992).

C. Burden of Showing Compliance

The school district carries the burden of showing that the teacher evaluation procedures were followed in accordance with law. *Beilhart v. Leetonia Exempted Village School District Board of Education*, Case No. 94-C-45, 1995 Ohio App. LEXIS 4134 (7th Dist. 9/22/95).

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D. Consequences of Failure to Comply

School districts who fail to comply strictly with the H.B. 330's evaluation procedures face the most severe consequences. Section 3319.11(B)(1) mandates the following result if the school board rejects the superintendent's recommendation to offer a continuing contract to a tenure eligible teacher :

> If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111 of the Revised Code . . . , the teacher is deemed reemployed under an extended limited contract for a term not to exceed one year at the same salary plus any increment provided by the salary schedule.

The same result is mandated if the school board accepts the superintendent's recommendation not to reemploy a tenure eligible teacher, O.R.C. § 3319.11(B)(2), or if the school board rejects the superintendent's recommendation to offer an extended limited contract to a tenure eligible teacher. O.R.C. § 3319.11(C)(3). If the teacher already had received an extended limited contract, and either recommends that the teacher not be reemployed or the school board rejects the superintendent's recommendation to offer a continuing contract, the consequences are even more severe if the school district fails to comply with the Section 3319.111(A):

> A teacher who does not have evaluation procedures applied in compliance with division (A) of Section 3319.111 of the Revised Code . . . is presumed to have accepted employment under a continuing contract unless such teacher notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

Because Section 3319.11 refers only to noncompliance with Section 3319.111(A) as the basis for overturning a nonrenewal, some management advocates contended that noncompliance with Section 3319.111(B) – which required that evaluation procedures include criteria of expected job performance, prescribed the number and length of observations, and required a written report of the results of the evaluation and specific recommendations regarding improvement – did not mandate that the teacher's contract be renewed. It did not take long for the Ohio Supreme Court to reject this argument:

> The failure of a board of education to comply with the observation requirements of R.C. 3319.111(B)(2) constitutes a failure to comply with the evaluation requirements of 3319.111(A). Such failure constitutes a ground upon which a court reverses a board of education's decision not to reemploy the teacher according to R.C. 3319.11(G)(7).

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> If a court determines that a board of education has failed to comply with the evaluation procedures required by former R.C. 3319.111(A), the teacher whose contract was not properly nonrenewed is entitled to back pay. This back pay begins to accumulate when the board improperly chose not to renew the teacher's contract.

Farmer v. Kelleys Island Board of Education, 69 Ohio St. 3d 156, 630 N.E.2d 721 (1994)(Syllabus ¶¶3-4). *Accord Snyder v. Mendon-Union Local School District Board of Education*, 75 Ohio St. 3d 69, 73, 661 N.E.2d 717, 721 (1996).

One court, however, has distinguished between complying with the substantive evaluation requirements of Section 3319.111 and the time lines. The court held that "[T]he date requirements in R.C. 3319.111(A) are ministerial in nature, and . . . substantial compliance is sufficient to satisfy this aspect of the statute." The court reasoned that:

> When read in the context of the entire statutory scheme, it is evident that the purpose of the time limits for giving the evaluation report to the teacher is to give the teacher the opportunity to comply and change his behavior prior to the next evaluation or before the end of the school year. In this regard, the failure of a school district to comply with the time limits can only be prejudicial to the extent that it denies the teacher a fair opportunity to make the necessary changes.

Tulley v. Wickliffe City School District Board of Education, Case No. 95-L-014, 1996 Ohio App. LEXIS 3041 (11th Dist. 7/12/96). In that case, the first evaluation was delivered two days after the statutory deadline of January 25th. The teacher was not observed again until March 11th, so the teacher was not prejudiced by the delay because there was ample time to act upon the previous evaluation. Moreover, the evaluation did not contain any recommendations for improvement because the teacher had improved somewhat in a deficient area.

E. Procedural Compliance vs. Weight of Evaluations

Section 3319.11(G)(7) provides that while a teacher may appeal the school board's nonrenewal decision:

> the court in an appeal under this division is limited to the determination of procedural errors and to ordering the correction of procedural errors and shall have no jurisdiction to order a board to reemploy a teacher, except that the court may order a board to reemploy a teacher . . . when the court determines that the evaluation procedures have not been complied with pursuant to division (A) of Section 3319.111 of the Revised Code . . . . Otherwise, the determination whether to reemploy or not reemploy a teacher is

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> solely a board's determination and not a proper subject of judicial review and, except as provided in this division, no decision of a board whether to reemploy or not reemploy a teacher shall be invalidated on any basis, including that the decision was not warranted by the results of any evaluation . . . .

Based upon this language, the Ohio Supreme Court has held that, "R.C. 3319.11(G)(7) limits a court's scope of review to procedural matters by expressly excluding substantive review of the merits . . . ." *Kiel v. Green Local School District Board of Education*, 69 Ohio St. 3d 149, 151-52, 630 N.E.2d 716, 718 (1994). This statutory language and the Ohio Supreme Court's interpretation seemingly insulates school districts from second-guessing the substantive judgments contained in an evaluation. As indicated below, however, the distinction between procedure and substance becomes very blurred, if not totally non-existent when the teacher alleges that the school district has violated Section 3319.111(B)(3) – which also violates Section 3319.111(A), and therefore, is a basis for invalidating a nonrenewal – by failing to provide specific recommendations regarding any improvements and the means to obtain assistance. Still, there are some examples where courts have rejected a direct challenge to the school official's evaluative judgments:

- After reviewing the extensive recommendations for improvement provided to the teacher, the court reversed the trial court's determination that these recommendations did not comply with Section 3319.111(B)(3), reasoning that:

  > Judicial inquiry is limited simply to whether the board supplied "specific recommendations regarding any improvements needed in the performance of the teacher being evaluated" and whether suggestions were made "regarding the means by which the teacher may obtain assistance in making such improvements." The record demonstrates that this procedural requirement was fulfilled by the board.

  McComb v. Gahanna-Jefferson City School District Board of Education, Case No. 98AP-331, 1998 Ohio App. LEXIS 5947 (10th Dist. 12/8/98).

- In another case, the court rejected the teacher's contention that the school board breached the contractual evaluations procedures because "the philosophy of the evaluation procedure, one of 'mutual goodwill and intent,' was subverted by the board." Specifically, the teacher argued that the principal's unwillingness to conduct more than the minimum number of classroom observations "was a breach of the inherent goodwill of the collective bargaining agreement . . . not to have provided her with every opportunity to improve her teaching skills, including extra observations if needed." The court responded that:

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> The Court does not take issue with plaintiff's belief that the use of more observations and evaluations would most likely have been of benefit to her. Article XII, Section (G) of the collective bargaining agreement, however, required only two in-class observations per semester, followed by a summative evaluation and conference. It is undisputed that the principal satisfied these requirements.

Flaherty v. Barberton City School District Board of Education, Case No. C.A. 18320, 1997 Ohio App. LEXIS 4750 (9th Dist. 10/29/97).

- After reviewing the specific recommendations for improvement that were provided to the teacher, the court rejected the teachers argument that these recommendations "were general, vague and could apply equally to all teachers," reasoning that:

> While appellant may well be correct that these recommendations may involve general topics, we cannot say that they are not in compliance with R.C. 3319.111(B)(3), as the deficiencies in appellant's performance may well be in these exact areas. Appellant takes issue with the weight given to these recommendations in this appeal, not their procedural sufficiency, which is the limited scope of our review.

Manno v. Chardon Local School District Board of Education, Case No. 96-G-1985, 1996 Ohio App. LEXIS 5403 (11th Dist. 11/29/96).

F. Procedural Requirements

1. Observed Teacher in Classroom Setting

While Section 3319.111(B)(2) requires an "observation of the teacher being evaluated," it does not specify whether the teacher must be observed only in a formal classroom setting, or whether the "observation" can involve activities outside of classroom instruction. Unfortunately, courts that have addressed this issue do not agree with the conclusion.

a. Not Required

> A teacher was reassigned to perform a project in her home after she was suspected of abusing students, which subsequently was substantiated by the County Children's Services Bureau. On two days in December and two days in February, the superintendent assigned the teacher to perform projects at his office so that she could be observed for evaluation. Each observation lasted thirty minutes, and the second and fourth observations were followed by written

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evaluations that included specific recommendations for improvement. The school approved the superintendent's nonrenewal recommendation, and the teacher was notified. Responding to the teacher's request, the school board stated in writing that the teacher's nonrenewal was "due to her unsatisfactory written evaluations and the 'substantiated' instances of abuse . . . toward three students." The court rejected the teacher's claim that "the evaluators were required to evaluate her in a classroom setting," reasoning that:

> [T]he statute does not require the observation to be of classroom work. The statute requires only the evaluation of the person while doing the tasks to which he or she was assigned. R.C. 3319.111(B)(1). Here, [the teacher] was assigned to do office work by [the superintendent]. Since [the superintendent] has the authority to assign nonteaching duties to teachers under the employment contract, her evaluation was proper.

Dove v. Allen County Educational Service Center Governing Board, 118 Ohio App. 3d 102, 107, 691 Ohio St. 3d 1127, 1131 (3d Dist. 1997).

b. Required

A guidance counselor alleged that she was not observed as a guidance counselor on any occasion. The school board responded that it observed the guidance counselor interacting with students at a financial aid meeting. The court held that:

> [T]he statute requires actual classroom performance evaluations. While a guidance counselor may present a specialized situation, we conclude that the record does not demonstrate appropriate observation technique.

Felker v. Board of Education of Mid-East Ohio Vocational School District, Case Nos. 93-11, 93-12, 1993 Ohio App. LEXIS 6115 (5th Dist. 12/6/93).

2. Evaluation Based Upon Information Outside of Formal Observations

Section 3319.111(B) requires that the "evaluation procedures include, but not be limited to . . . [o]bservation of the teacher being evaluated by the person conducting the evaluation on at least two occasions for not less that thirty minutes on each occasion." This language suggests that the evaluations may

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be based upon more than the two required observations. The courts that have addressed this issue have agreed.

- In one case, the court agreed that the teacher's evaluation could be based, in part, upon substantiated reports that the teacher had been abusing students, reasoning that:

> Nowhere does [Section 3319.111(B)] state that the evaluation must be limited to what is observed. In fact, the statute states specifically that the "evaluation procedures include, but not be limited to" the listed criteria. R.C. 3319.111(B). This means that the board is free to include other information in the evaluation report than just that observed during the formal observation period. Here, the evaluators took information from their observation period as well as the surrounding circumstances in reaching their evaluation.

Dove v. Allen County Educational Service Center Governing Board, 118 Ohio App. 3d 102, 107, 691 Ohio St. 3d 1127, 1131 (3d Dist. 1997).

- In another case, the teacher was assigned to teach Spanish classes at three different schools. After conducting two observations during the first semester, the assistant principal at one school prepared an evaluation in which he stated that he was relying upon the following sources of information:

  - his own observations of the teacher in the classroom;
  - the statement of the principal at another school that the teacher was late for work one time;
  - the observation of an assistant principal from the third school that the teacher once refused to be observed by the foreign language department head without having the union representative present; and
  - his own principal's observations that the teacher had problems dealing with parents and that she generally expanded the meaning of the principal's written attempts to communicate his concerns "far beyond their intent."

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After conducting two observations during the second semester, the principal at the third school completed a evaluation in which he stated that he was relying upon the following sources of information:

- his own observations;
- the first semester evaluation of the assistant principal at the first school; and
- the statements of the principal at the second school that: (1) on one occasion the teacher failed to control students who were disruptive during the reading of morning announcements; (2) the teacher was late for work twice; and (3) the teacher failed to respond in a timely manner to his request to schedule a meeting on a "non-disciplinary matter" because she insisted that a union representative be present at the meeting.

The court rejected the teacher's contention that "permitting the evaluation to be based upon information and allegations not observed by the evaluator, negates the observation requirement set forth in R.C. 3319.111," reasoning that, "the applicable statutes do not prohibit an evaluator from using information obtained from persons other than the evaluator who prepares a teacher's written evaluation . . . ." *Upp v. Washington Local School District Board of Education*, Case No. L-96-069, 1996 Ohio App. LEXIS 5159 (6th Dist. 11/22/96).

3. More Than One Evaluator

Section 3319.111 does not provide expressly whether one person must conduct all of the required observations, and whether that person must then complete the written evaluations. The courts that addressed this issue have reached somewhat different conclusions:

- In one case, the court upheld, without comment, the nonrenewal where different administrators from two different schools each conducted two observations and completed a written evaluation. *Upp v. Washington Local School District Board of Education*, Case No. L-96-069, 1996 Ohio App. LEXIS 5159 (6th Dist. 11/22/96).
- In another case, the teacher argued that the legislative purpose of H.B. 330 is frustrated when the school board utilized two different evaluators. The court invalidated one of the evaluations, but only because one of the evaluators "admitted that he did not know anything of the materials and procedures being taught, and who therefore relied upon the observations of a third party." The court

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added, however, that, "Whether or not the statute actually requires that in all cases the same evaluator conduct the observation and evaluation is a somewhat different question," that the court did not resolve. *Felker v. Board of Education of Mid-East Ohio Vocational School District*, Case Nos. 93-11, 93-12, 1993 Ohio App. LEXIS 6115 (5th Dist. 12/6/93).

4. Exceeding Statutory Requirements

Section 3319.111 requires that a teacher receive two written evaluations, each of which is based upon two observations, but the statute is silent as to whether any additional evaluations must follow the same two-to-one ratio of observations and evaluations. Courts have responded to this issue in the negative. The Ohio Supreme Court has held that:

> [T]he minimum statutory requirements are at least two evaluations based upon two observations for each of the evaluations and any *additional* evaluations need not comply with the two-observation rule.

Farmer v. Kelleys Island Board of Education, 70 Ohio St. 3d 1203, 1205, 638 N.E.2d 79, 80 (1994)(emphasis in original)("*Farmer II*"). In another case, the court held that the building principal permissibly conducted a fifth observation of the teacher and subsequently issued a third written evaluation. The court also noted that the fifth observation was conducted after the teacher had been recommended for nonrenewal by the superintendent and that the additional evaluation was completed at the request of the teacher's union representative. *Manno v. Chardon Local School District Board of Education*, Case No. 96-G-1985, 1996 Ohio App. LEXIS 5403 (11th Dist. 11/29/96).

5. Cross-Examination During Evaluation Conference

Section 3319.111(A) requires that a written report of the results of the two evaluations must be provided to the teacher no later than January 25th, and April 10th. The statute, however, does not specify how this written report is to be transmitted. Usually, this occurs through a conference, but the statute does not provide any guidance regarding how such a conference should proceed. Not surprisingly, unions often will attempt to convert these conferences into mini-hearings in which they demand the right to "question" the evaluators. One court has expressly rejected this effort. Even though the evaluators testified at the post-nonrenewal hearing and were subject to cross-examination at that time, the teacher alleged that her due process rights were denied because she did not have the opportunity to cross-examine them during the post-evaluation conferences. The court held that:

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neither the applicable statutes nor the Master Agreement require that a teacher be allowed to cross-examine all persons who contribute to a written evaluation at the post-evaluation conference.

Upp v. Washington Local School District Board of Education, Case No. L-96-069, 1996 Ohio App. LEXIS 5159 (6th Dist. 11/22/96).

G. Specific Recommendations

As discussed above, the requirement in Section 3319.111(B)(3), that the written evaluation must contain specific recommendations regarding improvements needed and the means to obtain assistance in making improvements, greatly undermines the mandate in Section 3319.11(G)(7) that nonrenewals are to be invalidated only for procedural violations. Not surprisingly, this requirement has been the avenue that nonrenewed teachers have used most to attempt reinstatement. Despite pronouncements that substantive evaluative judgment is not to be second-guessed, that is precisely what has been attempted repeatedly by teachers, and sometimes courts have agreed. Still, the process of trial and error has yielded favorable results for school districts as of late. In addition, courts appear to be responding unfavorably to efforts by teachers to raise hypertechnical challenges.

1. Not Needed If Performance Satisfactory

Section 3319.111(B)(3) does not address whether specific recommendations for improvement is needed in an area where the teacher either has performed satisfactorily or has improved. One court has held that the requirement does not apply in that instance. The teacher previously had received criticism for being sarcastic or caustic with his students, and an improvement plan had been formulated. Following the first two observations, the principal noted in his written evaluation that the teacher had improved in that area, so no recommendations for improvement were provided. The teacher's performance in that area, however, subsequently deteriorated, which was noted in his second evaluation. Consequently, nonrenewal was recommended. The court rejected the teacher's argument that the first evaluation was invalid because it failed to provided specific recommendations for improvement, reasoning that, "there was no area for improvement which needed to be noted in the first of the two evaluations at issue." *Tulley v. Wickliffe City School District Board of Education*, Case No. 95-L-014, 1996 Ohio App. LEXIS 3041 (11th Dist. 7/12/96).

2. Understandability of Recommendations

Not surprisingly, some nonrenewed teachers have challenged their evaluations by arguing that they did not "understand" the recommendations for improvement. Naturally, the claim that persons with college or advanced

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degrees cannot understand simple English strains credulity, and courts have tended to agree.

- In one case, the teacher claimed that he did not understand what his principal meant when he was advised to increase his "student participation." The court responded that, "The statute . . . does not place the burden upon the school board to assure that every teacher fully appreciates each suggestion that is made." The court concluded that the evaluations "were sufficiently 'specific' to alert a reasonable person to the need for change," and that the teacher's "subjective – and self-serving – claims of confusion do not necessitate a contrary conclusion." *Rickel v. Cloverleaf Local School District Board of Education*, 79 Ohio App. 3d 810, 814, 608 N.E.2d 767, 770 (9th Dist. 1992), *cert. denied*, 65 Ohio St. 3d 1421, 598 N.E.2d 1171 (1992).

- Similarly, the court rejected a lower court's holding that certain statements in the evaluation were "too vague for [the teacher] to understand," responding that:

> . . . R.C. 3319.111 does not place that burden upon the school board to assure that every teacher fully appreciates every suggestion for improvement or recommendation as to the means by which the teacher may obtain assistance in making the suggested improvements.

McComb v. Gahanna-Jefferson City School District Board of Education, Case No. 98AP-331, 1998 Ohio App. LEXIS 5947 (10th Dist. 12/8/98).

3. Does Not Have to be Specific to Academic Area

Equally unsuccessful was a claim by a teacher that the recommendations for improvement were invalid because the performance objectives were not "designed solely for secondary social studies teachers." The court responded that, "the Board must provide criteria for evaluations, and we read no further requirement into the statute to provide individualized objectives for different academic disciplines." *Manno v. Chardon Local School District Board of Education*, Case No. 96-G-1985, 1996 Ohio App. LEXIS 5403 (11th Dist. 11/29/96).

4. Incorporation by Reference Permitted

If a teacher receives specific recommendations for improvement in an evaluation and does not improve, the question arises whether the evaluator must take the time to repeat the same recommendations in the second

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evaluation or whether incorporation by reference is permitted. The Ohio Supreme Court, in a rare victory for school districts at this level, has held that:

> We believe that an evaluator complies with R.C. 3319.111(B)(3) when he incorporates by reference the statutorily mandated recommendations listed in earlier written reports that the teacher who is being evaluated has seen. Any other interpretation of R.C. 3319.111(B)(3) would be unreasonable, would serve no useful purpose, and would infringe unjustifiably upon a board of education's decision not to renew a teacher's contract. Although R.C. 3319.11 and 3319.111 must be construed liberally in favor of teachers because they are remedial statutes, a court may not read into a statute a result that the language does not reasonably imply.

Thomas v. Board of Education of Newark City School District Board of Education, 71 Ohio St. 3d 251, 254-56, 643 N.E.2d 131, 134 (1994). The Supreme Court held that the following statement was sufficient:

> In the performance checklist that I gave you in December, I indicated several concerns. I also made several specific suggestions in the [first evaluation] at the same time. I do not feel that you have made enough improvement for me to recommend that your contract be renewed.

Subsequent appellate court decisions have upheld this practice:

- In one case, the court held that the following statement satisfied the statutory requirement:

  > Following the initial evaluation/appraisal of August 1994 thru [sic] January 30, 1995, several recommendations for strengthening job performance were made. Having completed a second evaluation/ appraisal from the completion of the first phase through this date, I have observed no significant improvement in performance of items 1, 4, and 10 of this evaluation form.

  Langner v. Butler County Joint Vocational School District Board of Education, Case No. CA95-05-095, 1996 Ohio App. LEXIS 4689 (12th Dist. 10/28/96).

- In another case, the court held that it was permissible for the evaluator to refer to a plan of improvement that had been approved

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the prior Summer, but which the parties had intended would be followed during the next school year. *Tulley v. Wickliffe City School District Board of Education*, Case No. 95-L-014, 1996 Ohio App. LEXIS 3041 (11th Dist. 7/12/96).

5. Lack of Prejudice to Teacher from Noncompliance Irrelevant

Despite these successes for school districts, courts still require strict compliance with the statutory requirements, even if the teacher was prejudiced by the noncompliance. In one case, the court rejected the school district's argument that the teacher "was not prejudiced by the failure to include a second plan of improvement and means of assistance in conjunction with the second evaluation because [the teacher] had not made recommended improvements listed in his first evaluation report." *Semenie v. Board of Education of North Fork Local School District*, Case No, 93CA6, 1994 Ohio App. LEXIS 4291 (5th Dist. 9/6/94).

6. Recommendations Sufficiently Specific

In the following cases, the court held that the specific recommendations for improvement complied with Section 3319.111(B)(3):

- In review I would like for you to address the following problems:

  1. Construct more detailed lesson plans which include topics to be taught, objectives for the day, and any homework assigned.

  2. Spend time each day teaching techniques of Mystery and College Writing.

  3. Assign some of the work now being done in class as homework so you have time to cover the topics during class.

  4. Review the college writing and Mystery curriculum in the graded course of study, available course outlines, and in discussion with you department chairman.

  Thomas v. Board of Education of Newark City School District Board of Education, 71 Ohio St. 3d 251, 643 N.E.2d 131 (1994).

- The first set of evaluation materials identified a number of areas in which [the teacher] needed to improve her performance as a teacher:
  1) classroom management;
  2) maintaining on-task behavior of students; and
  3) positive student interaction.

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The materials also contained several specific recommendations regarding the means by which [the teacher] could obtain assistance in making the needed improvements . . . , including:

1) using more positive reinforcement to support desired classroom behavior;
2) providing students with alternative activities;
3) keeping instruction moving at a pace consistent with students' ability level;
4) circulating around the classroom to promote on-task behavior and to informally monitor student progress;
5) making students aware of expectations for the class, lab, or activity prior to beginning the exercise;
6) pairing students who may have difficulty staying on-task with students who generally maintain a high level of on-task behavior;
7) more reviewing of concepts than checking of homework;
8) reteaching of concept if there appears to be a lack of student comprehension;
9) less use of consequences for inappropriate behavior prior to questioning the student as to the reason for the inappropriate behavior; and
10) continuing enrollment in TESA (Teacher Expectations and Student Achievement) program and other professional development programs, with an emphasis on implementing the ideas, strategies and suggestions learned in these programs to improve teaching and classroom management skills.

The second set of evaluation materials also recommended areas in which [the teacher] needed improvement:

1) classroom climate, consistency in transitional time from one activity to another and presentation of lesson;
2) laboratory activities;
3) communication skills with students, colleagues and parents.

With regard to the first area of improvement . . . , recommendations . . . included:

1) continued pursuit of professional development in instruction strategies and techniques; and
2) videotaping of lessons as a means of assessing performance and critiquing performance with the aid of a colleague or successful classroom teacher.

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With respect to the second area of recommended improvement . . . , the evaluation materials contained very specific recommendations:

1) reminder and referral to classroom rules re: expectations, group learning situations;
2) state the purpose of the activity of lab;
3) if possible, show/demonstrate the procedure;
4) read the lab instructions/purpose/materials and problems that students may encounter;
5) ensure that all students are giving undivided attention as you review items mentioned in #4;
6) as the lab(s) are evaluated, changes should be made to ensure on-task behavior and focus on content. This can happen in the same day or after for consideration in future labs and activities.

Further suggestions for improving laboratory activities included:

1) involving more students in activities;
2) developing a formal or informal assessment strategy to ensure that students fully understand the activity;
3) assigning lab preparation as homework rather than using instructional time.

Regarding the third recommended area of improvement . . . , the following suggestions were made:

1) employing the least obtrusive intervention technique possible to manage students or redirect students back to the task;
2) regular correction of conditions that contribute to students being off-task or not following directions;
3) prompt return of parent telephone calls;
4) seeking professional development, reviewing literature and making a conscientious effort to improve communication with students, parents and colleagues.

McComb v. Gahanna-Jefferson City School District Board of Education, Case No. 98AP-331, 1998 Ohio App. LEXIS 5947 (10th Dist. 12/8/98).

- After the teacher's first observation, the principal wrote:

On Monday, after the observation [the teacher] and I had the opportunity to meet. . . . During that time I expressed my need to see [the teacher] demonstrate initiative and motivation about the business

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of teaching. To assist her at this time I have concentrated on a few goals . . . [:]

1.) I expect continued work/development of your classroom bulletin boards/decorations. . . .
2.) Student rapport: . . . Young children need to be noticed and made to feel special. You can try making sure that you say something/or do something special for each child each week. A quick checklist will help you keep a record of this. . . .
3.) Purposeful planning for instruction: Go through the graded course of study for your grade level . . . . Chart out general goals for each month and see that this is done for the school year. . . . I am willing to offer my assistance. I will also facilitate a time when you and your mentor teacher will meet weekly. You will plan to meet with me on a monthly basis. Your successful efforts in these areas should assist you in becoming an effective classroom teacher.

At her first summary evaluation conference, written recommendations included the following:

1.) Meet weekly with your mentor for the duration of your common planning time. . . .
2.) Read the language arts model for second grade. Write out a framework for the next nine weeks. Hand that into me on Monday, February 13th.
3.) Seek resources: books, professors, other teachers, for ideas strategies, etc.
4.) Attend the meetings offered at Summit County Office . . . .
5.) Read teacher publications.
6.) Use the resources in the teacher workroom.
7.) Read your weekly copy of the Master Teacher.
8.) Increased positive reinforcement to your students . . . .
9.) Enthusiasm in your presentation of the lesson. Develop appropriate rapport with your students.

After the third observation, the principal wrote:

Seek resources: books, professors, other teachers, for ideas and strategies; meetings/personnel at the county office, especially those for first year teachers and having to do with language arts, etc.; use the resources in the teacher workroom.

Flaherty v. Barberton City School District Board of Education, Case No. C.A. 18320, 1997 Ohio App. LEXIS 4750 (9th Dist. 10/29/97).

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7. Not Specific Enough

In the following case, the court held that the recommendations for improvement did not comply with Section 3319.111(B)(3):

- The written evaluation, conducted after the first two observations, indicated that the teacher needed to improve in the areas of "personal qualities, group control, rapport with students, and professional performance." The building administrator made the following specific comments:

> [The teacher] has a difficult time relating to students in his classroom. His emphasis on students taking responsibility for their education and employment has in my opinion been taken to extremes. As the classroom teacher and job coordinator of students who have been identified as being at-risk he needs to take a more active roll [sic] in ensuring their success. As an instructor in the classroom his abilities in presenting the information is [sic] average. As evidenced by written comments by his students the level of student-teacher rapport is not good. I would suggest that [the teacher] demonstrate more empathy and concern for his students as individuals. [The teacher] has shown a lack of concern for his professional growth as evidenced by his absence at the opening day staff development meetings. I would suggest that [the teacher] become more actively involved in the staff development program at [the high school] and in addition attend seminars on teacher-student relations. Many of these observations appeared on previous evaluations and continue to be a concern.

The court made the following criticism of these comments:

> The evaluation form does not contain an explanation of what is meant by "personal qualities," and none of the comments in the general observation section appear to specifically relate to this area, assuming one could figure out what "personal qualities" means. Likewise, no particular comments are made about "group control," and how [the teacher] might remedy this problem. With respect to the criticism that [the teacher] needed to take a more active role in ensuring student success, no suggestion,

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> again, is made concerning how this defect might be remedied, or where [the teacher] might go to obtain help. The remaining criticisms appear to relate to the categories of "student rapport," and "professional performance." Regarding rapport, [the teacher] was advised to attend a seminar on teacher-student relations, and finally, concerning "professional performance," he was told to become more actively involved in the staff development program at the high school.

The court held that the building administrator's comments in the evaluation form did not comply with the requirement in Section 3319.111(B)(3) to provide specific recommendations for improvement because:

> [T]he evaluation was . . . non-compliant by listing items such as "personal qualities," and "group control," while failing to make specific recommendations for improvement or list the means by which help could be obtained. A further defect was the failure to make suggestions for improvement or remedies in the area of taking a more active role in ensuring student success.

With respect to those areas where specific recommendations were provided, the court noted that the teacher's request to attend a seminar on "producing productive student behavior" was originally approved by the teacher's supervisor and then denied by the building administrator, ostensibly for lack of funds. However, two weeks after the denial, a statement was made at a lab or relations committee meeting that professional funds "are starting to get low and requests may have to be cut off in a month if they continue at the current rate." The court commented that:

> [The statutory purpose of helping teacher become better] is ill-served when a teacher is given a suggestion for improvement, finds his attempt to implement the recommendation rebuffed, and is subsequently dismissed for failing to act on the suggestion. In such circumstances, the requirement to give teachers means by which help can be obtained is rendered virtually meaningless.

Koch v. Greenville City School District Board of Education, Case No. C.A. 1403, 1996 Ohio App. LEXIS 5433 (2d Dist. 12/6/93).

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V. REASON FOR NON-RENEWAL

School officials who comply with all of the statutory evaluation requirements are forewarned that their task is far from complete before a nonrenewal decision can be defended in court. Section 3319.11(G)(1)-(2) requires, upon request of the teacher, that the school board provide a "written statement describing the circumstances that led to the board's intention not to reemploy the teacher." The procedural traps, second-guessing, and nit-picking are just as prevalent in this area as they are in proving specific recommendations for improvement in a performance evaluation, and the adverse consequences for non-compliance are nearly as severe.

A. Clear and Substantive Basis

The Ohio Supreme Court has established the following standard for complying with this requirement:

> R.C. 3319,11(G)(2) requires a board of education to provide a teacher under a limited contract a clear and substantive basis for its decision not to reemploy the teacher for the following school year.

Naylor v. Cardinal Local School District Board of Education, 69 Ohio St. 3d 162, 630 N.E.2d 725 (1994)(Syllabus ¶3). The Supreme Court commented that a statement that "does not describe any of the circumstances explaining how [the school board] arrived at its decision . . . [is] merely conclusory and leaves [the teacher] groping for answers as to why she was not offered a continuing contract" is inadequate.

B. Consequences of Failure to Comply

If there is any solace, and it is little, the penalty for non-compliance with this requirement is not reinstatement of the teacher; however, there still is a significant price to pay. The Ohio Supreme Court has held that:

> When a board of education violates R.C. 3319.11(G)(2) by failing to adequately describe the circumstances that led to its decision not to reemploy a teacher, the court in an appeal under R.C. 3319.11(G)(7) may award the teacher back pay until the board provides an adequate statement of circumstances.

Gerner v. Salem City School District Board of Education, 69 Ohio St. 3d 170, 630 N.E.2d 732 (1994)(Syllabus). The Supreme Court reasoned that:

> R.C. 3319.11(G)(7) restricts the availability of the remedy of reemployment to two circumstances: a failure by the board of education to properly evaluate a teacher under 3319.111(A) and a

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> failure to provide timely notice of the nonrenewal decision. Unless one of these two circumstances is present, a court in an appeal may not invalidate a board's decision not to reemploy a teacher.

While school boards can avoid the upheaval of reinstating an unwanted, and probably unqualified teacher, they still pay a heavy price. Judicial review of a school board's nonrenewal decision often takes two years or more. An adverse decision by the courts, therefore, can result in tens of thousands of dollars, or more, of back pay liability. In *Gerner*, for instance, judicial challenges consumed three school years.

C. Incorporation by Reference Prohibited

Although school officials may incorporate by reference prior recommendations for improvement to satisfy that statutory requirement, the Ohio Supreme Court inexplicably has taken the opposite position when complying with the statement of reasons for nonrenewal:

> Pursuant to R.C. 3319.11(G)(2), a board of education must provide a teacher with a clear and substantive basis for its decision not to renew a limited teaching contract. To satisfy this requirement, a board of education must expressly state the reasons underlying its decision and cannot incorporate by reference prior administrative reports as a basis for its decision.

Geib v. Triway Local School District Board of Education, 84 Ohio St. 3d 447, 705 N.E.2d 326 (1999)(Syllabus). The teacher in that case had received the following statement of reasons for her nonrenewal:

> The reasons for your nonrenewal are those deficiencies which are described in the classroom observation forms dated 10/24/95; 11/7/95; 12/4/95; 2/14/96; 2/26/96 and in the End of the Year Appraisal form dated 3/6/96. Those concerns and deficiencies were orally discussed with you and copies of the observation and appraisal forms were previously provided to you. Those forms are incorporated by reference into and made a part of this statement.

The Ohio Supreme Court declared that it was unwilling to extend the rationale of *Thomas* to this situation, reasoning that:

> When teachers are evaluated, it is common practice for administrators to make recommendations for improvements and to refer to these recommendations in subsequent reports. Thus, the incorporation of documents by reference supports that practice. However, when a teacher's limited contract is not renewed, we have interpreted R.C. 3319.11(G)(2) to require that the teacher be provided with a clear explanation behind the board of education's decision. In this respect,

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> the teacher is to be afforded "some measure of protection." We do not believe this goal is accomplished when a board of education simply states that its reasons are the deficiencies described in past records and directs a teacher to review the past records to learn why she is not being reemployed. . . . [T]he board has not *clearly* told the teacher why she was not re-employed. They have left her to figure it out for herself by reviewing the six forms.

84 Ohio St. 3d at 450-51, 705 N.E.2d at 328 (emphasis in original; citations and quotes omitted). The dissent, however, made the following observation:

> The board's statement prompted this teacher to request a hearing on her nonrenewal. At that hearing, which lasted for hours, [the teacher] attempted to refute the deficiencies and the decision on nonrenewal. The board did not change its decision, but the length and thoroughness of its review belie the argument that [the teacher] needed more information, or more explicit information, from the board in order to pursue her appeal of the decision.
>
> . . . . The most thorough explanation of the nonrenewal of a teacher who is being let go due to deficiencies discerned by administrators when performing in-classroom evaluations is to incorporate by reference all such evaluations, as was done here.

84 Ohio St. 3d at 452, 705 N.E.2d at 329 (Cook, J., dissenting).

D. Reason Sufficient

In light of the ruling in *Geib*, the continued viability of many prior cases that upheld a school board's statement of reasons for nonrenewal is uncertain. Still, the following cases are helpful in describing some of the practices utilized by school boards:

- In one case, the court noted that the teacher was provided a specific reason for nonrenewal, "nonperformance," and attached to the statement were copies of his evaluations and other related correspondence. The court held that:

  > While [the school board] could have provided a detailed dissertation explaining the thought process underlying his evaluations which ultimately led to the final decision to nonrenew, R.C. 3319.11(G)(2) does not require any more explanation than was provided.

  In light of the *Geib* holding, it appears that precisely such a dissertation now is needed.

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- In another cases, the teacher objected to the statement because two of the grounds identified in the written statement allegedly were not included as deficiencies in her evaluations. The court responded that:

> We find that from a procedural standpoint, the statement adequately describes the circumstances leading to the Board's decision not to reemploy [the teacher]. As to whether all four areas fall into the job target category of "demonstrating professional relationships with staff, students and community," the Board obviously concluded that the circumstances stem from [the teacher's] identified deficiency. We may not second-guess that determination."

It remains to be seen whether the Ohio Supreme Court will require that a performance-based statement of reasons for nonrenewal must be based upon a performance deficiency that was identified in the evaluations.

E. Reason Insufficient

In the following cases, the courts held that the school board's statement of reasons for nonrenewal did not comply with Section 3319.11(G)(2):

- The school board informed the teacher that, "the circumstances that led to the Board of Education's decision not to re-employ you are that, after the evaluation procedures required by O.R.C. 3319.11 were completed, the Superintendent recommended to the Board of Education that you not be re-employed, which recommendation the Board accepted at its meeting . . . , and the Board of Education forwarded to you notice of it's [sic] action." *Gerner v. Salem City School District Board of Education*, 69 Ohio St. 3d 170, 171, 630 N.E.2d 732, 733 (1994).

- In another case the school board stated that, "In reviewing the long term needs of the District, it was concluded by the Superintendent and accepted by the Board, that the District would be better served by not offering [the teacher] a continuing contract." *Naylor v. Cardinal Local School District Board of Education*, 69 Ohio St. 3d 162, 163, 630 N.E.2d 725, 727 (1994).

- In another case, the court rejected the school board's statement that a teacher was nonrenewed for failing to meet the school board's "competency expectations." *Beilhart v. Leetonia Exempted Village School District Board of Education*, Case No. 94-C-45, 1995 Ohio App. LEXIS 4134 (7th Dist. 9/22/95).

- Equally inadequate was a statement that a teacher was nonrenewed based upon "the uncertainty of the financial condition" of the school district for the next school year, and the "need to keep staffing decisions open for future

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determination." The court commented that, "The nebulous concept of 'financial uncertainty' and the need to keep staffing decisions open for the future is not, in our opinion, the statement of a clear and substantive basis for the Board's decision." *Haupricht v. Rossford Exempted Village School District Board of Education*, Case No. 93DW066, 1994 Ohio App. LEXIS 2462 (6th Dist. 6/10/94).

VI. HEARING REQUIREMENT

Although Section 3319.11(G)(4)-(6) provides some detail when such a hearing must be held and who must or may attend it, the statute provides no detail regarding how the hearing is to be conducted. By contrast, Section 3319.16, which applies to hearings for the termination of a mid-term limited or continuing contract, states quite clearly that, "Both parties may be present at such a hearing, be represented by counsel, require witnesses to be under oath, cross-examine witnesses, take a record of proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the treasurer of the board." In addition, the statute specifically authorizes juridical enforcement of witness subpoenas. This distinction led some management advocates to contend that a non-renewal hearing before the school board did not involve the same procedural guarantees and complexities that are found in contract termination proceedings. The Ohio Supreme Court has since said otherwise.

A. General Requirements

What the Ohio General Assembly did not expressly include in Section 3319.11(G)(4)-(6) the Ohio Supreme Court has added. In the case before the Supreme Court, the school board prohibited the teacher from calling any witnesses to testify on her behalf. The Supreme Court held that:

> The hearing provided teachers under limited contracts pursuant to R.C. 3319.11(G)(3), (4) and (5) necessarily includes the presentation of evidence, confrontation and examination of witnesses and the review of the arguments of the parties.

Naylor v. Cardinal Local School District Board of Education, 69 Ohio St. 3d 162, 630 N.E.2d 725 (1994)(Syllabus ¶4). The Supreme Court reasoned that:

> While we agree with the board that the type of hearing described in R.C. 3319.11(G)(5) does not necessarily entail the same procedures delineated in R.C. 3319.16, we find that the General Assembly intended a more thorough and formal proceeding than that which was accorded [the teacher]. If the General Assembly had intended to restrict a nontenured teacher's right to the simple recitation of a position statement, it could have easily done so by use of another phrase, such as "presentation of argument" or "oral argument." In our view, the requirements of R.C. 3319.11(G)(5) envision more than an informal session between a school board and

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> the teacher, where the teacher makes a verbal presentation protesting nonrenewal of his or her contract. The General Assembly must have intended more in light of the elaborate and comprehensive procedures appearing in R.C. 3319.11, as amended. R.C. 3319.11(G)(5) and (6) speak of a "hearing" and an "order," words clearly suggesting a proceeding that possesses some formality, especially in light of the liberal construction standard which must be applied to this remedial statutory scheme.
>
> In contrast to the hearing established in R.C. 3319.11(G) for teachers under limited contracts, administrators are merely accorded a "meeting" with the school board to "discuss reasons" for nonrenewal under R.C. 3319.02(D).
>
> . . . .
>
> Given the General Assembly's use of the term "hearing" in R.C. 3319.11(G)(3), (4) and (5), we can only conclude that the legislature intended the term to be given its ordinary meaning, to provide some measure of security to the nontenured teacher faced with the possibility of nonrenewal of his or her teaching contract. Our conclusion is further compelled by the remedial nature of these provisions.

69 Ohio St. 3d at 168-70, 630 N.E.2d at 730-31.

B. Consequences of Failure to Comply

Although the school board's failure to conduct an appropriate nonrenewal hearing is not one of the stated reasons for invalidating a nonrenewal, one court has held that reinstatement is mandated when a teacher's due process rights are violated during that hearing. The teacher was denied the opportunity to cross-examine his evaluator. The court reasoned that:

> [T]he board could not prove that it had complied with the evaluation procedures required by R.C. 3319.111(A) because the teacher was not provided with due process. The "evidence" relating to the evaluation procedures could not be considered when the failure to provide due process included the inability of the teacher to cross-examine those who wrote the evaluations.

Sparer v. Evergreen Local Schools, Case No. 94FU000003, 1994 Ohio App. LEXIS 4905 (6th Dist. 11/4/94). *Accord* *Mobley v. Rossford Exempted Village School District Board of Education*, Case No. 93WD052, 1994 Ohio App. LEXIS 2454 (6th Dist. 6/10/94); *Haupricht v. Rossford Exempted Village School District Board of Education*, Case No. 93DW066, 1994 Ohio App. LEXIS 2462 (6th Dist. 6/10/94).

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C. Appearance of Evaluator

Because of the statutory language, a dispute has arisen regarding who is required to attend the non-renewal hearing. Section 3319.11(G)(5) states that, "The superintendent, assistant superintendent, the teacher, and any person designated by either party to take a record of the hearing may be present at the hearing." This language raises two problems. First, there is no mention of the persons who conducted the observations and evaluations, who presumably are not either the superintendent or assistant superintendent. Second, the words "may attend" suggests that attendance is permissive. Not surprisingly, courts have disagreed on this issue.

1. Appearance Not Required

In the following cases, the courts refused to overturn a nonrenewal even though the evaluator was not present at the hearing:

- The court held that introducing the evaluations was permissible under the business records and public records exceptions to the hearsay rule. In addition, the superintendent, who had some personal knowledge of the information contained in the evaluations, who present and was subject to cross-examination. The teacher also had an opportunity to submit her own exhibits and "could have called the evaluators herself if she really wanted them there." *Dove v. Allen County Educational Service Center Governing Board*, 118 Ohio App. 3d 102, 107-08, 691 Ohio St. 3d 1127, 1131 (3d Dist. 1997).

- The school board did not call any witnesses, but it did submit a series of documents, including the evaluations. The teacher did not object to the introduction of the evaluations, and she did not cross-examine the superintendent, who was present. The teacher was allowed to present her own testimony, call another witness on her behalf, and make a summation to the school board. The court held that, "The documentary evidence submitted by the Board in this case was sufficiently probative without oral testimony to show that the Board complied with the contractual evaluation procedures." *Langner v. Butler County Joint Vocational School District Board of Education*, Case No. CA95-05-095, 1996 Ohio App. LEXIS 4689 (12th Dist. 10/28/96).

2. Appearance Required

In one case, the court held that the evaluator's absence from the hearing denied the teacher's right to confront and cross-examine witnesses. *Sparer v. Evergreen Local Schools*, Case No. 94FU000003, 1994 Ohio App. LEXIS 4905 (6th Dist. 11/4/94).

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C. Admissibility of Hearsay Evidence

In one case, the court held that the hearsay rule did not apply to administrative hearings, including nonrenewal hearings. "Thus, the board was free to consider all the testimony presented so long as the discretion to consider hearsay evidence was not exercised in an arbitrary manner." *Dove v. Allen County Educational Service Center Governing Board*, 118 Ohio App. 3d 102, 107, 691 Ohio St. 3d 1127, 1131 (3d Dist. 1997).

D. Reviewing Previous Year's Evaluations

In one case, the court rejected the teacher's contention that his due process rights were violated because favorable evaluations from prior school years were not admitted. The court reasoned that:

> The issue before the Board was its decision to nonrenew [the teacher] based upon the nonperformance of his duties as a classroom teacher in [the current school year]. The fact that [the teacher] satisfactorily performed his duties in his prior term of employment, years before, as evidenced by the evaluations for those years, or in the past year, was not relevant to whether [the teacher] had failed to adequately perform his duties in the [current] school year. Although [the teacher] claims that these evaluations were valuable to show "whether or not [the teacher] is a 'non-performer,' they simply do not go to whether, in [the current school year], [the teacher] had failed to satisfactorily perform his duties.

Manno v. Chardon Local School District Board of Education, Case No. 96-G-1985, 1996 Ohio App. LEXIS 5403 (11th Dist. 11/29/96).

VII. FINAL DECISION OF THE BOARD

A. General Requirements

Section 3319.11(G)(6) requires the school board to issue a written decision concerning whether to uphold or vacate the nonrenewal within ten days after the hearing concludes. Interestingly enough, a statutory provision that details the method of issuing notices to teachers does not cover this decision. *See* O.R.C. § 3319.11(H)(1) (requires either personal service or certified mail, return receipt requested).

B. Delay in Decision – Standard of Prejudice

As with other requirements under H.B. 330, the question is raised as to the consequences if the school board fails to meet this deadline. One court that addressed this issue responded favorably to the school boards by requiring the

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teacher to show actual prejudice caused by the delay. The teacher was present when the school board read its decision publically, but the teacher claimed that he did not receive a written copy of the decision until twenty-two days later. He timely appealed that decision to court. In rejecting the teacher's challenge, the court held that:

> [M]ere proof of a procedural violation by itself is insufficient to warrant judicial relief. . . . [T]he courts of this state will ignore "harmless" errors which do not affect the substantial rights of the parties. We can discern no legitimate reason why, in the particular context of R.C. 3319.11(G)(7), that a premium should be placed upon technical or trivial defects in school board proceedings. Consequently, it is incumbent upon the teacher pressing a challenge under this provision to demonstrate prejudice to an actual right or interest.

Rickel v. Cloverleaf Local School District Board of Education, 79 Ohio App. 3d 810, 815, 608 N.E.2d 767, 771 (9th Dist. 1992), *cert. denied*, 65 Ohio St. 3d 1421, 598 N.E.2d 1171 (1992). The court concluded that the teacher was not prejudiced by the delay.

VIII. TERMINATION

A. Statutory Grounds

The substantive grounds and procedural requirements for terminating a teaching contract are delineated in Section 3319.16 of the Ohio Revised Code. Section 3319.16 authorizes teaching contract terminations for four reasons: (1) gross inefficiency; (2) immorality; (3) willful and persistent violations of reasonable regulations of the board of education; and (4) other good and just cause. Of the four grounds, the one that is most pertinent to the subject of appropriate evaluations is gross inefficiency.

Although not defined in Section 3319.16, courts have defined a grossly inefficient person as "one whose efforts [are] failing , to an intolerable degree, to produced the effect intended or desired – a manifestly incompetent or incapable person." *Baker v. Board of Education of Twin Valley Community Local School District*, Case No. CA89-05-008, 1989 Ohio App. LEXIS 4310 (12th Dist. 11/20/89). In addition, "the key is the adjective 'gross.' To constitute gross inefficiency, the inefficiency must be flagrant, extreme, or complete." *Rumora v. Board of Education of Ashtabula Area City School District*, 43 Ohio Misc. 48, 75, 335 N.E.2d 378, 395 (1973). Moreover, "[i]nefficiency . . . does not consist of a separate act but embraces a course of conduct, a lack of integrity, or limitation of capacity." *Powell v. Young*, 148 Ohio St. 342, 357, 74 N.E.2d 261, 268 (1947).

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B. Procedural Requirements – Statutory

1. Pre-Termination Hearing

Although Section 3319.16 prescribes only post-termination hearing procedures, school districts have a constitutional due process obligation to conduct a pre-termination hearing procedure. Courts have held that teachers who have a continuing contract, as well as limited contract teachers during the term of their contract, have an expectation of continued employment that constitutes a "property" right under the Fourteenth Amendment to the U.S. Constitution that cannot be denied without due process of law. Because they are political subdivisions of the State of Ohio, school boards must comply with the Fourteenth Amendment. The pre-termination hearing requirement is not onerous. A brief, informal hearing during which the teacher receives notice of the grounds for termination and has an opportunity to respond in an effort to avoid clear error satisfies the requirement. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

2. Termination Resolution

Section 3319.16 mandates that, "Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its treasurer of its intention to consider the termination of his contract with full specification of the grounds for such consideration." Surprisingly, there are no cases in which the courts have elaborated upon this requirement. Caution dictates, however, the school boards err on the side of specificity in complying with this requirement.

3. Trial-Type Hearing

Unlike the hearing requirement under H.B. 330, Section 3319.16 mandates a full, trial-type hearing after the school board has approved a resolution calling for the teacher's termination from employment. The hearing is presided over by a neutral referee unless both the school board and the teacher agree that a majority of the board shall preside. The school board is required to provide for a complete stenographic record of the hearing, and to provide a copy of the transcript to the teacher. All testimony is under oath, and both parties have the right to present and cross-examine witnesses, compel the attendance of witnesses through subpoenas that are enforceable by the courts, offer documents, make arguments, and be represented by legal counsel.

4. School Board Action on Referee's Recommendation

The referee is required to submit to the school board a report that contains findings of fact and a recommendation regarding whether the teacher's

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contract should be terminated. The school board then must vote to accept or reject the referee's findings and recommendation. Any such review is subject to the following:

1. The referee's findings of fact must be accepted unless such findings are against the greater weight, or preponderance of the evidence;

2. A school board has the discretion to accept or reject the recommendation of the referee unless such acceptance or rejection is contrary to law.

Aldridge v. Huntington Local School District Board of Education, 38 Ohio St. 3d 154, 527 N.E.2d 291 (1988)(Syllabus). *Accord Graziano v. Board of Education of Amherst Exempted Village School District*, 32 Ohio St. 3d 289, 292-93, 513 N.E.2d 282, 285 (1987)(*per curiam*).

5. Court Review

A teacher whose contract is terminated by the school board may appeal the decision to the court of common pleas in the county in which the school is located. The right to appeal "is not a right to a trial *de novo*, but is a right to a review of" the termination decision. *Powell v. Young*, 148 Ohio St. 342, 74 N.E.2d 261 (1947)(Syllabus ¶1). The common pleas court, however, is authorized to "hold such additional hearings as it considers advisable, at which it may consider other evidence in addition to the transcript and record." O.R.C. § 3319.16. "The Common Pleas Court may reverse an order of termination of a teacher's contract, made by a Board of Education, where it finds that such an order is not supported by or is against the weight of the evidence." *Hale v. Board of Education of City of Lancaster*, 13 Ohio St. 2d 92, 234 N.E.2d 583 (1968)(Syllabus ¶1). The common pleas court's decision is subject to an abuse of discretion standard by the appellate court. *Graziano v. Board of Education of Amherst Exempted Village School District*, 32 Ohio St. 3d 289, 294, 513 N.E.2d 282, 286 (1987)(*per curiam*).

C. Importance of Evaluations

Performance evaluations play an even more important role in contract termination proceedings than they do in nonrenewal proceedings. The evaluator's subjective judgment is not supposed to be an issue under H.B. 330. In contract termination proceedings, by contrast, the substance of the evaluation becomes very relevant, if not dispositive of the issue of removing the teacher. Evaluations that are poorly prepared or contain inaccurate or otherwise indefensible ratings can result in the reinstatement of the teacher regardless of whether the teacher really is qualified to teach. Comprehensive, accurate, and fair evaluations, however, can support the

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school board's termination decision. The following cases exemplify the positive impact of defensible evaluations:

- The building principal thoroughly evaluated the teacher for two consecutive school years after the teacher had assumed an assignment that differed significantly from his previous assignment. The court rejected the teacher's argument that he had shown substantial improvement. The evidence demonstrated that the teacher had shown improvement in a few areas, but he had not shown overall improvement. The court noted that there "was overwhelming evidence of [the teacher's] gross inefficiency" and that any claims that the superintendent was biased "Were absolutely pale in light of the course of conduct of" the teacher. *Buie v. Chippewa Local School District Board of Education*, Case No. C.A. 2924, 1995 Ohio App. LEXIS 4040 (9th Dist. 9/13/95).

- The school board presented evidence that for thirteen years the teacher's evaluations reflected concerns about no lesson plans and lack of classroom management and organization. In addition, for the past ten years, the teacher's evaluations raised concerns about high numbers of failing students. Later evaluations showed a continuation and escalation of problems, including lack of effective discipline and classroom control, lack of proper instruction, an untidy classroom, illegible handwriting, loss of pupil projects and homework, and disorganization. In rejecting the teacher's contention that she was not grossly inefficient, the court held that, "The record contains evidence of [the teacher's] difficulty in maintaining discipline, failure to communicate effectively with students, failure to undertake various actions recommended to improve her teaching performance, failure to record attendance, failure to use effective tests and testing methods, failure to prepare lesson plans, and her admissions that she assigned grades arbitrarily." *Wolford v. Board of Education of Newark City School District*, Case No. 92-CA-5, 1992 Ohio App. LEXIS 4675 (5th Dist. 9/8/92).

- In rejecting the teacher's contention that she was not grossly inefficient, the court commented that, "evaluations can be useful evidence to show whether or not there is just cause for termination of a teacher's contract. The court indicated that the teacher "was given notice of the standards she was expected to follow" because "[t]he record is replete with instances in which [the principal] discussed with [the teacher] acceptable ways to maintain discipline, proper grading procedures and proper classroom procedures, all of which she ignored." *Baker v. Board of Education of Twin Valley Community Local School District*, Case No. CA89-05-008, 1989 Ohio App. LEXIS 4310 (12th Dist. 11/20/89).

- The school board's evidence consisted principally of three annual formal evaluations prepared by the building principals and various observations made by other individuals during visits to the teacher's classroom.

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Upholding the termination, the court stated that, "the evaluations reflected consistent concern regarding [the teacher's] abilities in the areas of teaching competencies, classroom management and pupil-staff-community relations. In addition, the observations by other individuals indicated significant areas of concern regarding [the teacher's] teaching methodology and ability to handle students." *Clements v. Board of Education of Mad River Township*, Case No. 7712, 1982 Ohio App. LEXIS 13059 (2d Dist. 8/16/82).

- The teacher had been evaluated during two consecutive school years by two different principals. Each evaluation was preceded by several classroom observations and conferences during which recommendations for improvement were made. Finding that "there was evidence presented to the referee that established facts sufficient to meet the statutory grounds of gross inefficiency and other good and just cause," the court commented that the principals had "notified [the teacher] of their concerns with his teaching, offered to help him, and offered him the opportunity to have another outside evaluator which he declined," but that the teacher "did not completely follow the recommendations and was repeatedly reminded or shown how to carry out the recommendations." *Fair v. West Carrollton City School District*, Case No. CA 10906, 1988 Ohio App. LEXIS 4172 (2d Dist. 10/17/88).

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Fair Dismissal Proceedings and Mock Hearing

Education Law Association Conference
June 24, 1999

Presented by

Gregory B. Scott
and
Julie C. Martin
Scott, Scriven & Wahoff LLP

00079

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EDUCATION LAW ASSOCIATION

Legal Strategies -- Settlement Strategies

June 24, 1999

I. Role reversals of nonrenewals and other alternatives.

A. The problem with nonrenewals.

1. Litigation cost.

2. Strict tie-in with evaluation.

Snyder v. Mendon-Union Local School Dist. Bd. of Educ., 75 Ohio St.3d 69 (1996); Naylor v. Cardinal Local School Dist. Bd. of Educ., 69 Ohio St.3d 162 (1994).

3. Strict scrutiny of compliance with evaluation and non-renewal requirements. E.g., Geib v. Tri-Way Local School Dist. Bd. of Educ., 84 Ohio St.3d 447 (1999).

B. The advantages and disadvantages of:

1. Reduction in force (suspension).

a. Limitations on reasons.

b. Disputes over seniority and displacement.

c. No statutory challenge usually.

2. Termination per R.C. 3319.16.

a. Cost.

b. Referee's recommendation/Board's discretion.

c. No statutory evaluation.

II. Getting a resignation as an alternative.

A. Process for set up.

1. Conference with and level with employee (union representation).

2. Set a timeframe for acceptance of resignation or to proceed.

3. Allow a reasonable time for response.

B. Acceptance of resignation by formal Board action.

C. Typical issues that arise.

1. Letters of recommendation ("neutral"/more than neutral).

2. Run-out of sick leave.

3. Restrictions on public release or comment -- public records. State ex rel. Findlay Publ. Co. v. Hancock Co. Commissioners, 80 Ohio St.3d 134 (1997); R.C. 149.43.

4. Expungement -- public records destruction. R.C. 149.41.

III. Economic realities in nonrenewal and termination cases.

A. Nonrenewal.

1. Board hearing.

a. Board's legal counsel.

b. Court reporter and one copy of transcript.

c. Court litigation.

B. Termination.

1. Hearing before Referee.

a. Board's legal counsel.

b. Court reporter and three copies of transcript.

c. Referee's fees and expenses.

2. Board review and action on referee's recommendations. Alridge v. Huntington Local School Dist. Bd. of Educ., 38 Ohio St.3d 154 (1988).

3. Bottom line for OEA -- one to two years' pay for settlement.

IV. More complex work-out issues.

A. Purchase of military or other credit. (R.C. 3307.02, 3307.32, 3307.33)

B. Alternative positions, changes in contract status.

C. Unpaid leaves of absence with purchase of service credit. (R.C. 3307.22)

D. Severance pay or retirement incentive. (R.C. 124.39)

EDUCATION LAW ASSOCIATION
FAIR DISMISSAL MOCK HEARING

June 24, 1999

Cast:

John Concannon as the Union Attorney
George Crisci as the Middle School Science Teacher
Rick Dickinson as the Referee
Julie Martin as the Board of Education Attorney
Greg Scott as the Middle School Principal

Factual Background:

Mr. Crisci is a middle school science teacher who has just finished his twentieth year teaching in the school district. He has a continuing contract. Mr. Crisci has always been a sub-par performer but has never been pressured to improve -- until the 1998-99 school year. Mr. Scott has just finished his second year as principal of the building and is anxious to make his staff top flight. The former principal of the building "retired in his job," so Mr. Crisci always received satisfactory to above satisfactory evaluations. At the beginning of the school year, Mr. Scott set his goal to either have Mr. Crisci improve greatly or get him out.

By the end of April, Mr. Scott had determined that Mr. Crisci was not improving, and he wanted to initiate termination proceedings. The collective bargaining agreement provides that a teacher can be terminated pursuant to R.C. §3319.16. It also provides that if a continuing contract teacher is going to be terminated for poor performance (gross inefficiency), that teacher must be given evaluations consistent with R.C. §3319.111.

In May, Mr. Crisci's fate was sealed, from Mr. Scott's perspective, by how he handled a student discipline matter. While students were doing computer work in Mr. Crisci's classroom, one student downloaded information on building pipe bombs. This student began telling his classmates that he enjoyed the "science" of pipe bombs and thought it would be interesting to build one at school. Mr. Crisci then engaged the students in a discussion of the physics and chemistry of pipe bombs. At least four students reported the day's events to their parents who were very unhappy with Mr. Crisci's actions given the current climate in the country's schools. Mr. Scott suspended the student for ten days. Mr. Crisci believes that the student posed no threat to anyone and that Mr. Scott over-reacted. Mr. Crisci has not been shy in sharing this opinion with others. Mr. Crisci further believes that he was able to use the discussion as a good educational tool.

Termination proceedings were initiated against Mr. Crisci under R.C. 3319.16 for gross inefficiency, for willful and persistent violations of reasonable regulations of the board of education; and/or for other good and just cause.

Exhibits: —

Exhibit A is the first evaluation of Mr. Crisci (attached)
Exhibit B is the second evaluation of Mr. Crisci (attached)
Exhibit C contains 17 letters from students and parents in support of Mr. Crisci

University City Schools
RECORD OF APPRAISAL OF CERTIFICATED STAFF

Name George Crisci Position 8th Science

Evaluator Greg Scott School Year 1998-99 Building UCMS

Evaluation 1

Observation 1	10/28/98	2:49 - 3:25	Greg Scott
	Date	Time	Observer
Observation 2	12/5/98	2:05 - 2:44	Greg Scott
	Date	Time	Observer
Other Observation			
(Not required)			
	Date	Time	Observer
Conference	1/25/99		Greg Scott
(Not required)	Date	Time	Evaluator

Evaluation 2

Observation 1			
	Date	Time	Observer
Observation 2			
	Date	Time	Observer
Other Observation			
(Not required)			
	Date	Time	Observer
Conference			
(Not required)	Date	Time	Evaluator

Contract Status

Current Year:	____1 yr.	____2 yr.	____3 yr.	____Cont.
Eligible for:	____1 yr.	____2 yr.	____3 yr.	____Cont.
Recommended for:	____1 yr.	____2 yr.	____3 yr.	____Cont.

Signatures

Eval. 1	Greg Scott	1/25/99	George Crisci	1/25/99
	Evaluator	Date Completed	Teacher	Date Received
Eval. 1				
	Evaluator	Date Completed	Teacher	Date Received

Instructions For Completing The Narrative Appraisal Report

On a separate sheet of paper the Evaluator will provide a narrative of the following:

1. Performance strengths and commendable professional characteristics.
2. Performance areas which are in need of improvement or are unsatisfactory. For each area identified, *specific* written recommendations for improvement AND specific recommendations regarding the means by which the teacher may obtain assistance will be included.
3. Summary of the Appraisal.

On a separate sheet of paper the Teacher may comment on the following:

1. Any disagreement with the valuator's appraisal.
2. Any plans for improvement and/or goal statements.

EXHIBIT A

BEST COPY AVAILABLE

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TEACHER OBSERVATION

NAME George Crisci DATE OF OBSERVATION 10/28/98

CLASS 8th Grade Science TIME: IN 2:49 OUT 3:25 OBSERVER Gregory B. Scott

I. SUBJECT(S) OF CLASS; ACTIVITIES, METHODS AND MATERIALS USED:
Inertia lab to demonstrate Newton's First Law of Motion. Also shows how forces affect enertia and that moving objects have enertia.

II. PROCEDURES:

		YES	NO	N/A	NOT OBS.
A.	Calls class to order promptly	X			
B.	Takes attendance	X			
C.	Handles tardiness to class				
D.	Checks any homework	X			
E.	Begins lesson promptly	X			
F.	Class in on task throughout period		X		
G.	Assigns homework	X			
H.	Fire/Tornado Procedures posted and legible	X			
I.	Grade and plan book properly filled out				X
III. METHODS:					
J.	Maintains appropriate learning atmosphere		X		
K.	Is knowledgeable in subject matter	X			
L.	Lesson is well-organized, show planning		X		
M.	Uses variety of activities and materials				
N.	Uses good questioning techniques				X
O.	Involves all students in activities		X		
P.	Room is neat, appropriately decorated		X		
Q.	Gives specific, clear directions and assignments	X			
IV ATTITUDES:					
R.	Maintains appropriate rapport with students		X		
S.	Accepts all students; listens to students		X		
T.	Handles difficult students appropriately		X		
U.	Is flexible, spontaneous	X			
V.	Is enthusiastic, optimistic		X		

TEACHER OBSERVATION

NAME George Crisci DATE OF OBSERVATION 12/5/98

CLASS 8th Grade Science TIME: IN 2:05 OUT 2:44 OBSERVER Gregory B. Scott

I. SUBJECT(S) OF CLASS; ACTIVITIES, METHODS AND MATERIALS USED:
Inertia lab to demonstrate Newton's First Law of Motion. Also shows how forces affect enertia and that moving objects have enertia.

II. PROCEDURES:

		YES	NO	N/A	NOT OBS.
A.	Calls class to order promptly	X			
B.	Takes attendance	X			
C.	Handles tardiness to class	X	2 students came tardy handled appropriately		
D.	Checks any homework				X
E.	Begins lesson promptly	X			
F.	Class in on task throughout period		X		
G.	Assigns homework				X
H.	Fire/Tornado Procedures posted and legible	X			
I.	Grade and plan book properly filled out				X
III. METHODS:					
J.	Maintains appropriate learning atmosphere	X			
K.	Is knowledgeable in subject matter	X			
L.	Lesson is well-organized, show planning	X			
M.	Uses variety of activities and materials	X	Lab activity to demonstrate a concept		
N.	Uses good questioning techniques				X
O.	Involves all students in activities	X			
P.	Room is neat, appropriately decorated		X		
Q.	Gives specific, clear directions and assignments	X			
IV ATTITUDES:					
R.	Maintains appropriate rapport with students	X			
S.	Accepts all students; listens to students	X			
T.	Handles difficult students appropriately	X			
U.	Is flexible, spontaneous	X+	due to performance		
V.	Is enthusiastic, optimistic		X		

EVALUATION NARRATIVE

OF

— GEORGE CRISCI

January, 1999

1. In my evaluation of Mr. Crisci, I found George to be organized. George's lessons are a combination of teacher guided instruction and student led exploration of concepts accomplished via lab activities. George provides opportunities for hands-on activities and group activities which are an extension of classroom concepts that helps students develop a deeper understanding and appreciation for science. He uses a wide range of assessment practices, both formal and informal, that guide his instruction. I would encourage George to use these assessment strategies to plan activities and find alternatives for making decisions in re: to testing group activities, and overall classroom arrangement practices. I would also encourage George to use more positive reinforcement to support the desired classroom behavior. I would also recommend that George provide alternative activities and keep instruction moving at a pace that is consistent with students' ability level. George continues to seek professional development opportunities to improve his teaching and classroom management skills. George's greatest area of improvement must come in the areas of classroom management and maintaining on-task behavior of students in his classroom. I look for George to implement ideas, strategies and suggestions that he obtains as a result of Professional Development opportunities.

2. George shows some degree of having positive student interaction, but his attitude needs to improve. I have encouraged George to find alternative ways to re-direct students' attention to the lesson and group activities. He is making progress in this area and with time, I am confident that he will be successful in implementing successful classroom management activities. I would encourage George to implement a classroom management system which fosters responsible student behavior.

3. George's attitude with colleagues is poor. He must act in a more professional manner with his fellow teachers.

Teacher George Crisci Evaluator D. G. Scott

The signature of the teacher does not necessarily indicate agreement with the conference. The signature indicates that the conference was held and that the teacher received a copy of the summary and the instruments used.

University City Schools
RECORD OF APPRAISAL OF CERTIFICATED STAFF

Name George Crisci Position 8th Science

Evaluator Greg Scott School Year 1998-99 Building UCMS

Evaluation 1

Observation 1	10/28/98	2:49 - 3:25	Greg Scott
	Date	Time	Observer
Observation 2	12/5/98	2:05 - 2:44	Greg Scott
	Date	Time	Observer
Other Observation			
(Not required)			
	Date	Time	Observer
Conference	1/25/99		Greg Scott
(Not required)	Date	Time	Evaluator

Evaluation 2

Observation 1	3/15/99	9:50 - 10:27	Greg Scott
	Date	Time	Observer
Observation 2	3/17/99	1:16 - 1:46	Greg Scott
	Date	Time	Observer
Other Observation			
(Not required)			
	Date	Time	Observer
Conference	3/26/99		Greg Scott
(Not required)	Date	Time	Evaluator

Contract Status

Current Year:	1 yr.	2 yr.	3 yr.	Cont.
Eligible for:	1 yr.	2 yr.	3 yr.	Cont.
Recommended for:	1 yr.	2 yr.	3 yr.	Cont.

Signatures

Eval. 1	Greg Scott		George Crisci	1/25/97
	Evaluator	Date Completed	Teacher	Date Received
Eval. 1	Greg Scott		George Crisci	3/26/97
	Evaluator	Date Completed	Teacher	Date Received

Instructions For Completing The Narrative Appraisal Report

On a separate sheet of paper the Evaluator will provide a narrative of the following:

1. Performance strengths and commendable professional characteristics.
2. Performance areas which are in need of improvement or are unsatisfactory. For each area identified, *specific* written recommendations for improvement AND specific recommendations regarding the means by which the teacher may obtain assistance will be included.
3. Summary of the Appraisal.

On a separate sheet of paper the Teacher may comment on the following:

1. Any disagreement with the valuator's appraisal.
2. Any plans for improvement and/or goal statements.

EXHIBIT B

00089

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TEACHER OBSERVATION

NAME George Crisci DATE OF OBSERVATION 3/15/99

CLASS 8th Grade Science TIME: IN 9:50 OUT 10:27 OBSERVER Gregory B. Scott

I. SUBJECT(S) OF CLASS; ACTIVITIES, METHODS AND MATERIALS USED:
Inertia lab to demonstrate Newton's First Law of Motion. Also shows how forces affect enertia and that moving objects have enertia.

II. PROCEDURES:

		YES	NO	N/A	NOT OBS.	
A.	Calls class to order promptly				X	
B.	Takes attendance				X	
C.	Handles tardiness to class				X	
D.	Checks any homework	X+	less time spent than before			
E.	Begins lesson promptly	X	transition not fluid			
F.	Class in on task throughout period	X				
G.	Assigns homework	X	finish questions for homework from lab			
H.	Fire/Tornado Procedures posted and legible	X				
I.	Grade and plan book properly filled out	X				
III. METHODS:						
J.	Maintains appropriate learning atmosphere	X-	class was extremely noisy at beginning			
K.	Is knowledgeable in subject matter	X-	somewhat knowledgable			
L.	Lesson is well-organized, show planning	X	purpose not stated or articulated			
M.	Uses variety of activities and materials	X+	lab			
N.	Uses good questioning techniques	X				
O.	Involves all students in activities	X				
P.	Room is neat, appropriately decorated	X+				
Q.	Gives specific, clear directions and assignments	X-	re: lab; having a demonstration would have helped			
IV ATTITUDES:						
R.	Maintains appropriate rapport with students	X--				
S.	Accepts all students; listens to students	X				
T.	Handles difficult students appropriately				X	
U.	Is flexible, spontaneous	X-				
V.	Is enthusiastic, optimistic	X-				

TEACHER OBSERVATION

NAME George Crisci DATE OF OBSERVATION 3/17/99

CLASS 8th Grade Science TIME: IN 1:16 OUT 1:46 OBSERVER Gregory B. Scott

I. SUBJECT(S) OF CLASS; ACTIVITIES, METHODS AND MATERIALS USED:
Inertia lab to demonstrate Newton's First Law of Motion. Also shows how forces affect enertia and that moving objects have enertia.

II. PROCEDURES:

		YES	NO	N/A	NOT OBS.
A.	Calls class to order promptly				X
B.	Takes attendance				X
C.	Handles tardiness to class				X
D.	Checks any homework	X			
E.	Begins lesson promptly				X
F.	Class in on task throughout period	X majority not entire class			
G.	Assigns homework				
H.	Fire/Tornado Procedures posted and legible				
I.	Grade and plan book properly filled out	X			

III. METHODS:

J.	Maintains appropriate learning atmosphere	X			
K.	Is knowledgeable in subject matter	X- somewhat knowledgeable			
L.	Lesson is well-organized, show planning	X			
M.	Uses variety of activities and materials	X			
N.	Uses good questioning techniques	X lead in questions			
O.	Involves all students in activities	X			
P.	Room is neat, appropriately decorated	X			
Q.	Gives specific, clear directions and assignments	X directions were better for this lab			

IV ATTITUDES:

R.	Maintains appropriate rapport with students		X- redirection of student needs improvement		
S.	Accepts all students; listens to students	X			
T.	Handles difficult students appropriately		X- student off - redirectio drew attention to studen		
U.	Is flexible, spontaneous	X			
V.	Is enthusiastic, optimistic	X			

EVALUATION NARRATIVE

OF

— GEORGE CRISCI

March, 1999

1. In my evaluation of Mr. Crisci, I found his instructional strategies to be adequate. While Mr. Crisci has made some improvements in his teaching, I remain very concerned about the instrumental climate in his class. I observed a lack of consistency in transitional time from one activity to another. Whether it be from attendance to start of lesson or from lesson to activity. The transition was not fluid. In two observations, I felt that there was a loss of instructional time by having students prepare the materials. I felt there was a lack of basic review of key terms related to the lesson which led me to believe that Mr. Crisci lacked either, knowledge of the content, or was not properly prepared for the lesson. I did not observe any type of physical demonstration as a means of introducing lab activities which could clarify directions and enhance student understanding of the concept or objectives of the lesson. Mr. Crisci did have an agenda for the students listed on the board and the room was neatly and appropriately decorated. Teaching requires careful assessment to a lesson, before being taught and, after being taught especially when teaching a difficult concept such as Genetics. I feel that this assessment does occur prior to Mr. Crisci teaching a lesson and to a lesser degree after the lesson. I recommend that Mr. Crisci pursue continued Professional Development in Instructional Strategies and Technique. I also recommend that Mr. Crisci video tape lesson(s) as a means of assessing his performance and critique him with the aide of colleague or successful classroom teacher.

2. Mr. Crisci's interactions with student and colleagues cause me great concern. In my first evaluation I shared this with Mr. Crisci and shared with him that the issue needed to be addressed. Mr. Crisci should use the least obtrusive intervention technique possible to manage students or re-direct students back to the tasks, but he does not on a consistent basis. Mr. Crisci still has a tendency to draw attention to the situation or student which is not appropriate. Conditions that contribute students being off-task or not following directions are not corrected on a regular basis. It should also be noted that Mr. Crisci exhibits poor communication skills with colleagues. There has been many occasions when Mr. Crisci has said things to colleagues that are inappropriate and unprofessional. He has been informed of this, but continues to display this type of conduct.

   Mr. Crisci needs to seek professional development, review literature and make a conscience effort to improve in the area of communicating with students, parents,

and colleagues. Unless he pursues professional development he will continue to experience problems in the area of communicating with people effectively.

4. It is my recommendation to the Board of Education that it initiate termination proceedings under the collective bargaining agreement for gross inefficiency. This recommendation is based on failure to implement effective teaching strategies in your classroom and unprofessional conduct in the area of Human Relations with students and staff.

Teacher _____ Evaluator Greg Scott

The signature of the teacher does not necessarily indicate agreement with the conference. The signature indicates that the conference was held and that the teacher received a copy of the summary and the instruments used.

George Cruse refused to sign
- Greg Scott
3/26/97

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